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In The

Supreme Court of the United States

October Term, 1994

JACK MA,

Petitioner,

vs.

TRW INC.,

Respondent.

On Petition For A Writ Of Certiorari
To The California Court Of Appeal,
Second Appellate District, Division Four

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Where a defense contractor (a) is required by contract to protect classified national defense information, (b) performs this function in compliance with detailed Department of Defense ("DOD") regulations and under strict governmental supervision, (c) is obligated by the regulations to conduct an inquiry into suspected security violations and immediately report the result to the DOD and the FBI, and (d) orders an employee whom it suspects of espionage to come to an interrogation without an attorney, on pain of losing his job if he refuses, is the defense contractor a state actor for purposes of determining whether the employee's Fifth Amendment privilege against self-incrimination has been violated?

2. Does a defense contractor violate an employee's Fifth Amendment privilege against self-incrimination when it (a) requires an employee to appear *without counsel* to answer questions concerning potential security violations which could also constitute federal crimes, (b) threatens to fire the employee unless he appears and answers questions, (c) fails to advise the employee that any answers he gives could not be used against him in a criminal proceeding (*see Garrity v. New Jersey*, 385 U.S. 493 (1967) and its progeny) and then (d) fires the employee for refusing to be interrogated without his attorney present?

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PETITION FOR WRIT OF CERTIORARI

Jack Ma respectfully petitions for a writ of certiorari to review the judgment of the California Court of Appeal, Second Appellate District, Division Four in this case.

OPINIONS BELOW

The opinion and judgment of the California Court of Appeal, Second Appellate District, Division Four is reported at 25 Cal. App. 4th 1834, 31 Cal. Rptr. 2d 460 (1994) and is reprinted in the appendix [hereinafter, "Pet. App."] at A-1 to A-40.

The trial court's "Statement of Decision Following Bench Trial of Right to Attorney Issue" is unreported and is reprinted in Pet. App. at A-41 to A-46.

JURISDICTION

The judgment of the California Court of Appeal was entered on June 22, 1994. That court denied a timely petition for rehearing on July 21, 1994. Pet. App. at A-47. On September 15, 1994, the California Supreme Court denied a timely petition for review. Pet. App. at A-48. Jurisdiction is conferred on the Court by 28 U.S.C.A. § 1257(a) (West 1993).

CONSTITUTIONAL PROVISIONS INVOLVED

The Fifth Amendment to the Constitution of the United States, which provides, in relevant part:

> No person . . . shall be compelled in any criminal case to be a witness against himself. . . .

STATEMENT OF THE CASE

A. As A Defense Contractor Entrusted With Classified Information, TRW Is Mandated By The Industrial Security Manual To Immediately Report And Investigate Suspected As Well As Actual Security Violations.

Like all defense contractors who handle classified information, TRW Inc. ("TRW") entered into a Security Agreement, form DD 441, governing TRW's provision of "supplies or services, which are required and necessary to the national security of the United States." 3A Appellant's Appendix in Support of Petition for Writ of Mandate [hereinafter, "Rec."] at 1294; 4 Rec. at 1477-1478, 1573; 2 Rec. at 606-607. The Security Agreement expressly incorporates the 345-page Department of Defense ("DOD") Industrial Security Manual ("ISM"). 2 Rec. at 606.

The ISM is designed to "protect and safeguard U.S. government information that has been classified in the interest of national security. . . . " 4 Rec. at 1573. It implements the provisions of seventeen different federal statutes, executive orders and regulations, including the

Espionage Act, the Sabotage Act and the National Security Act of 1947. 1 Rec. at 17-18.

The ISM dictates the contractor's response to actual and even suspected security breaches in painstaking detail. Section 6(b) requires the contractor to submit immediately to the Defense Industrial Security Clearance Office a report concerning "any information coming to [the contractor's] attention concerning any of [its] employees who have been cleared . . . for access to classified information, which indicate that such access or determination may not be clearly consistent with the national interest." 1 Rec. at 48-49. Sections 6(a)(1) and 6(a)(2) direct the contractor to immediately submit a written report to the CSO[1] of any "[e]spionage, [s]abotage, or [s]ubversive [a]ctivities," and "any loss, compromise (including deliberate compromise), or suspected compromise of classified information." 1 Rec. at 45. Section 6(c) requires an immediate report to the FBI of information coming to the contractor's attention concerning "existing or threatened espionage, sabotage, or subversive activities" at any of the contractor's plants. 1 Rec. at 51.

Sections 7(a) and 7(b) mandate that the contractor "establish a procedure to ensure that each loss, compromise or suspected compromise of classified information and each failure to comply with the requirements of this

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[1] The CSO ("Cognizant Security Office") (1 Rec. at 5) is the "office of the DIS [Defense Investigative Service] Director of Industrial Security who has industrial security jurisdiction over the geographical area in which a facility is located." 1 Rec. at 20. As part of the DIS, the CSO is an employee of the DOD. 4 Rec. at 1479.

manual is immediately reported to the FSO [Facility Security Officer],"[2] and "establish such procedures as are necessary to ensure that any employee discovering the loss, compromise or suspected compromise of classified information outside a facility promptly reports such a fact to: (1) the nearest office of the FBI . . . , and (2) the FSO, by the fastest means of communication. . . . " 1 Rec. at 51-52. Section 7(c) requires the contractor to "immediately . . . [i]nitiate a preliminary inquiry to ascertain all of the circumstances surrounding the reported loss, compromise, suspected compromise or failure to comply with the requirements of this manual." 1 Rec. at 52.

If the government-mandated preliminary inquiry confirms that a security breach has occurred, the contractor "immediately shall submit a report of the incident to the CSO . . . and conduct a complete investigation of the incident unless otherwise notified by the CSO." 1 Rec. at 51-52.

The contractor's discretion in handling classified information and in performing the mandated investigations of suspected or actual security breaches is tightly circumscribed. Pursuant to the Security Agreement, the contractor must implement a "system of security controls within the organization in accordance with the requirements of the [ISM]." 2 Rec. at 606. The ISM provides that this system of security controls is to be codified in a written "Standard Practice Procedure" ("SPP"). The SPP must be submitted to the CSO for approval before the contractor obtains its classified information clearance, and modified upon notification from the government that it does not adequately implement the ISM. 1 Rec. at 39.

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[2] The FSO is appointed by the contractor. 1 Rec. at 30.

In addition, under the Security Agreement, the contractor is subject to periodic inspections of "the procedures, methods, and facilities" it employs in complying with the ISM. 2 Rec. at 606. A former security investigations manager at TRW testified that during his tenure teams of six to ten Defense Investigative Service inspectors annually conducted on-site audits lasting two to three weeks, during which they comprehensively reviewed TRW's maintenance of classified information. 3A Rec. at 1282-1287. The inspectors then sent TRW reports detailing their findings. 3A Rec. at 1286-1287.

B. Jack Ma, A TRW Employee, Unknowingly Becomes The Subject Of A Security Investigation Mandated By The ISM.

Jack Ma was employed as a physicist by TRW in January of 1985, and assigned to highly sensitive research concerning the hardening of missile silos against nuclear attack. 3 Rec. at 992, 1002, 1005-1006; 4A Rec. at 1748-1749. In June 1985 Ma and his project were transferred to another section. 3 Rec. at 1014-1018; 4A Rec. at 1748. Ma objected to the transfer because he felt his new supervisor did not have appropriate expertise. 3 Rec. at 1018, 1022-1025.

On November 6, 1985, a TRW employee named George Hoffman visited Charles Wuller, Ma's department head, to voice his concern that Ma was a security risk. On November 7, Hoffman gave Wuller a memorandum explaining that, six months earlier, Hoffman had reported to a co-worker possible security violations by Ma. Hoffman purportedly had heard Ma talking on the telephone

with foreign nationals, saying that TRW is working on "warheads," "silo penetration," and "space weaponry." Supplemental Appendix in Support of Return to Petition for Writ of Mandate [hereinafter "Supp. Rec."] at 74. The memo also described an alleged conversation in which Ma had said he was working on a system of "quantum gravity reversal" which would cause hostile missiles to reverse course, return to their launch points and detonate. Supp. Rec. at 75.

Between November 7 and 11, Ma had a series of meetings with Wuller and other TRW supervisory personnel. At these meetings, the transfer was discussed, but not the alleged security violations. Ma was told to see a company psychiatrist and not to report for work until contacted. 3 Rec. at 1039-1062.

During this time, Ma became concerned that he was facing a "trump up," and so he cancelled the appointment with the psychiatrist and, on about November 15, hired attorney Dennis Devermont to represent him. 3 Rec. at 1054-1055, 1071-1072. Ma advised TRW to direct further communications to Devermont. 3 Rec. at 1071-1072. At TRW's request, a meeting among Ma, his attorney Devermont and a TRW attorney was held. Again, the transfer was discussed, but no mention was made of the alleged security violations. 3 Rec. at 1073-1079.

Meanwhile, on November 7, unbeknownst to Ma, Wuller sent a memo to TRW's security department explaining his suspicions about Ma, attaching the Hoffman memo and requesting an investigation. Supp. Rec. at 20.

C. TRW Demands Ma Submit To A Security Interview Without His Attorney Present. TRW Says Nothing About Whether Statements Ma Might Make During The Interview Could Later Be Used To Incriminate Him.

About a week after the meeting among Ma and the lawyers, Earl Nishimura, a TRW security investigator, called Ma and directed him to report on December 12 for an interview concerning security violations. Ma told Nishimura to contact his attorney, and stated he would attend the interview if he was permitted to bring his attorney along. 3 Rec. at 1101. Nishimura said nothing about whether Ma's statements at the interview could be used against him in a subsequent criminal prosecution.

On December 13, TRW's personnel manager wrote to Ma, incorrectly stating Ma had *refused* to attend an interview with Nishimura. Supp. Rec. at 84. The December 13 letter further stated:

> These security allegations are a serious matter which, if true, would be violations of TRW's security policies *and of the Industrial Security Manual which is issued by the Defense Investigations* [sic] *Service.* Your cooperation with this investigation is a condition of employment with TRW.
>
> . . . .
>
> . . . As a result of your refusal to cooperate, you have been suspended without pay effective December 12, 1985. *Your continued refusal to cooperate will result in the termination of your employment with TRW.*

Supp. Rec. at 4 (emphasis added).

At about the same time, Nishimura spoke with Ma's attorney and advised him of the charges against Ma. 4A Rec. at 1840. Devermont relayed the information to Ma. 3 Rec. at 1095, 1153; 3A Rec. at 1183-1186. Ma viewed the allegations of security violations as "baloney" and "trumped up" (3 Rec. at 1095, 1109; 3A Rec. at 1170), but was frightened that they could lead to criminal indictment, conviction and possibly life imprisonment or death. 3 Rec. at 1155, 1109.

When Ma failed to appear for the interrogation at 10:00 a.m. on December 12, Nishimura immediately called the FBI and told Agent Gill Cordova, "You get down here." Cordova was at Nishimura's office by 10:30 a.m. Supp. Rec. at 6.

On December 20, TRW's security department sent a report to the Defense Industrial Security Clearance Office, explicitly citing section 6(b)(1) of the ISM, and incorrectly stating that Ma had *refused* to appear for a security interview. Supp. Rec. at 78-79.

On January 9, 1986, Devermont wrote to TRW's counsel explaining Ma's willingness to be interviewed with his attorney present. Supp. Rec. at 2. A month later, TRW's counsel wrote back, advising Ma that he could not be represented by counsel at the interview. Supp. Rec. at 81. TRW's letter again said nothing about how Ma's testimony at the interview could be used.

In February 1986, Ma met alone with a Defense Investigative Service agent, after obtaining the latter's assurance that, if at any time Ma felt the interview was being conducted unfairly, he could stop it and call in his lawyer. 3A Rec. at 1210, 1212. Ma and the agent discussed

the alleged security violations, and no further action was taken. 3A Rec. at 1232-1234.

On December 4, 1987, TRW fired Ma for failure to attend the security interrogation without counsel. Supp. Rec. at 4. Ma timely filed this action, alleging he was wrongfully terminated for asserting his Fifth Amendment right to have an attorney present at the security interrogation. 2 Rec. at 661 (Second Amended Complaint).

D. Federal Questions Are Presented In Motions In Limine.

Both Ma and TRW moved the trial court below in limine for rulings whether, *inter alia*: (1) TRW was a state actor for purposes of implementing its DOD-mandated security program; and (2) TRW violated Ma's privilege against self-incrimination by refusing to allow his attorney to attend the security interrogation. 2 Rec. at 686, 696; 2A Rec. at 722. After hearings and a bench trial, the trial court ruled in Ma's favor on both issues. Pet. App. at A-41 to A-46. Reviewing the trial court's decision by writ, the Court of Appeal, Justice Woods concurring and dissenting, found neither government action nor a Fifth Amendment violation.[3] Pet. App. at A-17, A-36 to A-37.

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[3] TRW also moved in limine for a ruling on a third issue: whether an employee's right to an attorney at an interrogation concerning criminal charges is a well-established and fundamental public policy in California. Pet. App. at A-15. The trial court answered in the affirmative. Pet. App. at A-42. However, the Court of Appeal, having found neither state action nor a Fifth Amendment violation, vacated the trial court's ruling. Pet. App. at A-35.

REASONS FOR GRANTING THE WRIT

I. UNDER THE DECISION BELOW, CALIFORNIA WILL HAVE A DIFFERENT RULE FROM THE REST OF THE NATION ON AN ISSUE AFFECTING NATIONAL DEFENSE AND NATIONAL SECURITY.

Providing for the national defense and protecting national security by safeguarding classified information are traditional governmental functions. Moreover, they are traditionally and necessarily the province of the *federal* government. Because the defense arena is, by nature, hierarchical and highly structured, implementation of an effective defense policy requires uniform rules created by the Department of Defense. The Industrial Security Manual, which contains regulations applicable to every defense contractor in the nation entrusted with classified information, exemplifies such rules.

Given the federal character of the defense effort and the need for centralized decisionmaking, state governments have no legitimate interest in creating their own individual rules on national defense issues. The Court of Appeal opinion in this case, however, is just such an idiosyncratic rule. It provides that, in California, defense contractors implementing a government-mandated security program are not state actors. As discussed more fully below, this rule is inconsistent with decisions of this Court, as well as with other federal authority.

The Court of Appeal's decision is particularly troublesome because it creates the law in California, the most

populous state and the state with the largest concentration of defense contractors. The decision will impact a significant portion of the national defense effort. Thousands of defense contractors and their tens of thousands of employees will be subject to California's peculiar state action rule. Further complicating matters, numerous defense contractors who do business in California and in other states will be subject to one state action rule here and a different rule everywhere else. This conflict could result in inconsistent application of the ISM's regulations, even though the regulations do not allow for innovation in enforcement.

In short, a writ of certiorari should be granted so that an aberrant California precedent on an important issue of federal law can be brought into line with controlling authority and uniformity in national defense policy can be restored.

II. THE CALIFORNIA COURT OF APPEAL DECIDED THE STATE ACTION ISSUE HERE IN A WAY THAT CONFLICTS WITH A UNITED STATES COURT OF APPEALS DECISION AND WITH CONTROLLING DECISIONS OF THIS COURT.

A. The Courts Found State Action In *Becker v. Philco Corp.*, *Edmonson v. Leesville Concrete Co.* And *West v. Atkins*, Three Decisions Critical To The Present Case.

The California Court of Appeal's decision conflicts irreconcilably with *Becker v. Philco Corp.*, 372 F.2d 771 (4th Cir.), *cert. denied*, 389 U.S. 979 (1967), a case involving a defense contractor's enforcement of precisely the same

provisions of the ISM at issue here.[4] In *Becker*, the Fourth Circuit held that Philco was a governmental actor when, pursuant to the ISM, it sent the Department of Defense a report concerning suspected compromises of classified information by the plaintiffs. The court explained why Philco had "the attributes of a Federal agency in the problem of this controversy":

> Indisputably, the Government by the contract bared and confided State secrets to Philco. The company was imparted, and it worked in, knowledge exclusively the sovereign's. It was a sharing of confidence, quite aside from a subcontract for the production of defense supplies. So it was that the company and such of its employees as were confidants were answerable for keeping the nation's secrets, as fully as if they were governed by the oath of a Federal official.

Becker, 372 F.2d at 774.

The Court of Appeal opinion below not only clashes with *Becker*, but also fails entirely to consider, and conflicts irreconcilably with, the two most recent decisions of this Court concerning when a private entity becomes a government actor: *Edmonson v. Leesville Concrete Co.*, 500 U.S. 614, 111 S. Ct. 2077 (1991) and *West v. Atkins*, 487 U.S. 42 (1988).

In *Edmonson*, this Court expanded upon the two-part framework for state action analysis set forth nine years earlier in *Lugar v. Edmondson Oil Co.*, 457 U.S. 922 (1982).

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[4] The ISM itself specifically cites and relies on the *Becker* case. 1 Rec. at 49, n.13.

The first part of the analysis asks "whether the claimed constitutional deprivation resulted from the exercise of a right or privilege having its source in state authority." *Edmonson*, 111 S. Ct. at 2082-83; *see Lugar*, 457 U.S. at 937. The second part asks "whether the private party charged with the deprivation could be described in all fairness as a state actor." *Edmonson*, 111 S. Ct. at 2083; *see Lugar*, 457 U.S. at 937. In *Edmonson*, the Court explained that resolution of the latter question depends upon three principles: (1) "the extent to which the actor relies on governmental assistance and benefits," (2) "whether the actor is performing a traditional governmental function" and (3) "whether the injury caused is aggravated in a unique way by the incidents of governmental authority." *Edmonson*, 111 S. Ct. at 2083. Using this analytical framework, the Court in *Edmonson* held that a private litigant was deprived of equal protection when its adversary in a civil suit attempted to exclude jurors on the basis of race.

In *West v. Atkins*, the Court held a private physician who contracted with a state prison to provide medical care for prison inmates was a state actor and consequently subject to suit under 42 U.S.C.A. section 1983 for his decision not to recommend surgery on a prisoner's injured leg. The *West* opinion stated, "Defendants are not removed from the purview of § 1983 simply because they are professionals *acting in accordance with professional discretion and judgment.*" *West*, 487 U.S. at 52 (emphasis added). In a footnote expanding on this principle, the Court explained and limited its previous holdings in *Blum v. Yaretsky*, 457 U.S. 991 (1982) and *Rendell-Baker v. Kohn*, 457 U.S. 830 (1982) as follows:

> [In *Blum* and *Rendell-Baker*, this] Court suggested that the private party's challenged decisions could satisfy the state-action requirement if they were made on the basis of some rule of decision for which the State is responsible. The Court found, however, that the decisions were based on independent professional judgments and were not subject to state direction. Thus, the requisite "nexus" to the State was absent.
>
> This determination cannot be transformed into the proposition that no person acts under color of state law where he is exercising independent professional judgment. "[T]he exercise of . . . independent professional judgment," is not, as the Court of Appeals suggested, "the primary test." 815 F.2d, at 995, n.1. And *Blum* and *Rendell-Baker* provide no support for respondent's argument that a physician, employed by the State to fulfill the State's constitutional obligations, does not act under color of state law merely because he renders medical care in accordance with professional obligations.

West, 487 U.S. at 52 n.10.

B. The California Court Of Appeal Erroneously Found No State Action Here.

The *Becker* court recognized that the government exercises strict control over defense contractors through the investigation and reporting provisions of the ISM. It explained:

> The obligation [to report suspected security breaches] could scarcely be couched in more imperious or exacting language. It embraces both true and false accusations, both substantial

> and insubstantial suggestions, perhaps encompassing even rumors. It demands investigation of them by the company and a report of it to the Defense Department. That is precisely what Philco did.

Becker v. Philco Corp., 372 F.2d 771, 774 (4th Cir.), *cert. denied*, 389 U.S. 979 (1967). Accordingly, the *Becker* court correctly found unquestionable state action in Philco's obedience to the ISM's mandate. In this case, nevertheless, the court dismissed *Becker* and the "imperious or exacting language" of the ISM and found *no* state action. The California court reasoned that the ISM required Philco's report to the DOD, but "did not mandate the particular conduct of which [Jack] Ma complains" – the security interrogation without counsel – even though it "required an inquiry." Pet. App. at A-24. This is a distinction without a difference. Both the report in *Becker* and the preliminary inquiry concerning Ma were undertaken pursuant to section 7 of the ISM.[5] *Id.* at 772-773 (citing earlier version of ISM with virtually same text as current version but different section numbers). The interrogation conducted as part of TRW's "preliminary inquiry" can hardly be deemed private conduct when the report in *Becker* constituted state action. *Becker* and the present case cannot be

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[5] Section 7(c) requires a "preliminary inquiry to ascertain all of the circumstances surrounding" any suspected loss or compromise of classified information. 1 Rec. at 52. Section 7(d) requires that if the preliminary inquiry *confirms* a loss or compromise of classified information, the contractor must send a report to the Department of Defense "in accordance with paragraph 6a(2)." 1 Rec. at 45, 52. Philco submitted its report to the DOD in accordance with sections 7(d) and 6(a)(2). *See Becker*, 372 F.2d at 773.

reconciled. In short, the question whether a defense contractor is a state actor in complying with the ISM has been answered correctly by the federal court in *Becker* and incorrectly by the state court below. This Court should grant the petition to resolve the conflict.

A writ of certiorari is also warranted by the California Court of Appeal's failure even to cite, much less consider, this Court's decisions in *Edmonson v. Leesville Concrete Co.*, 500 U.S. 614, 111 S. Ct. 2077 (1991) and *West v. Atkins*, 487 U.S. 42 (1988). As explained above, *Edmonson* sets forth a comprehensive multi-part test for state action. Applying the *Edmonson* test to the present case, the result is inescapable that TRW's conduct constituted state action. The first prong of the test is easily satisfied: In seeking to interrogate Ma, TRW was exercising its privilege to participate in the national defense program, and it was following rules of conduct, the ISM, imposed by the DOD.

Turning to the second prong of the *Edmonson* test, the facts demonstrate TRW must "be described in all fairness as a state actor" when it sought to interrogate Jack Ma pursuant to the ISM.

First, it is undisputed that the vast majority of TRW's business is defense contract work funded by the federal government. Thus, TRW relies extensively on governmental assistance and benefits.

Second, national defense, and particularly the protection of classified defense information, is traditionally, exclusively and quintessentially a governmental function. When the government employs private contractors to help perform this function, the contractors operate under

the strict mandate of the ISM. In effect, as a condition of participating in and profiting from the national defense program, defense contractors like TRW are obliged to assume governmental responsibility for safeguarding classified information.

It is critical to note that TRW's assumption of the traditional governmental functions of national defense and national security led directly to the constitutional deprivation Ma suffered. The ISM left TRW no choice but to conduct a thorough investigation of the allegations against Ma. 1 Rec. at 52 (the contractor shall "immediately . . . initiate a preliminary inquiry to ascertain all of the circumstances surrounding the reported loss, compromise, suspected compromise or failure to comply with a requirement of this manual"). TRW specifically invoked the ISM in its December 13, 1985 letter to Ma advising him of the necessity for submitting himself to the security interrogation. The letter stated, "These security allegations are a serious matter which, if true, would be violations of TRW's security policies and of the Industrial Security Manual which is issued by the Defense Investigation Service." Supp. Rec. at 84. Clearly, TRW understood the ISM mandated the interrogation. Finally, the ISM compelled TRW's December 20, 1985 report to the Defense Industrial Security Clearance Office concerning the allegations about Ma.

Turning to the last *Edmonson* factor, the injury to Jack Ma caused by TRW's violation of Ma's privilege against self-incrimination was uniquely aggravated by the incidents of governmental authority. The result of the government-mandated security interrogation could have been criminal prosecution and/or termination of Ma's

employment, his security clearance and his ability to find employment anywhere within the vast national defense program. In sum, the facts of this case fully satisfy all of the *Edmonson* criteria for state action.

Rather than applying the *Edmonson* test, however, the California Court of Appeal focused almost exclusively on a principle drawn from *Jackson v. Metropolitan Edison Co.*, 419 U.S. 345, 351, 358 (1974) – "the involvement of the government in the particular decision about which a plaintiff complains." Pet. App. at A-19. While briefly acknowledging *Lugar v. Edmondson Oil Co.*, 457 U.S. 922 (1982), the court relied principally on *Blum v. Yaretsky*, 457 U.S. 991 (1982) and *Rendell-Baker v. Kohn*, 457 U.S. 830 (1982), neither of which involved a traditional, indeed exclusively, governmental function such as national defense. The court recognized that the ISM mandated TRW's " 'preliminary inquiry to ascertain *all of the circumstances*' " surrounding Ma's suspected compromise of classified information. Pet. App. at A-23; 1 Rec. at 52 (emphasis added). The court reasoned, nonetheless, that "the ISM did not specify *how* this inquiry was to be conducted. The ISM did not even specifically require that an interview of the suspected employee be conducted much less mention the presence of counsel." Pet. App. at A-23. Thus, it concluded "TRW's decision not to allow Ma's attorney to attend the interview was a private decision not involving federal government action." Pet. App. at A-23. This approach flies in the face of *West v. Atkins*, 487 U.S. 42 (1988).

West made clear that *Blum* and *Rendell-Baker* do *not* stand for the proposition that the exercise of professional judgment forecloses state action. To the contrary, *West*

held that professional discretion and state action are compatible. Applying *West*'s principles to this case leads to a result opposite from the one reached by the court below. Just as the prison doctor's decision not to recommend surgery did not foreclose a finding of state action in *West*, TRW's decision to interview Ma without counsel, made in the exercise of its professional judgment as a defense contractor required to implement the ISM, did not foreclose state action here. In fact, the discretion a practicing physician enjoys is far broader than the discretion the government vested in TRW. The ISM mandated TRW's response to even suspected security breaches, and the Security Agreement provided that TRW's internal procedures for responding had to be approved by the Department of Defense.

In *United States v. Davis*, 482 F.2d 893 (9th Cir. 1973), Judge Browning went to the heart of the matter in holding that employees of private airlines who conducted airport searches pursuant to governmental directive were government actors. He explained:

> Constitutional limitations on governmental action would be severely undercut if the government were allowed to actively encourage conduct by "private" persons or entities that is prohibited to the government itself.
>
> It makes no difference that the act of opening appellant's briefcase was accomplished by a "private" airline employee rather than a "public" official. The search was part of the overall, nationwide anti-hijacking effort, and constituted "state action" for purposes of the Fourth Amendment.

Id. at 904 (footnote omitted); *accord, United States v. Ross*, 32 F.3d 1411 (9th Cir. 1994).

So it is here. TRW's attempted interrogation of Jack Ma was part of the federal government's national security effort. Realistically, immediate interrogation of Jack Ma was the only sensible choice available to TRW. Under the circumstances, section 7(c) of the ISM required TRW to question Jack Ma as surely as if Ma's name were written into the regulations. 1 Rec. at 52.

III. THIS CASE PRESENTS A FIFTH AMENDMENT ISSUE WHICH HAS DIVIDED THE CIRCUIT COURTS OF APPEALS, NAMELY, WHETHER THE "PROPER PROCEEDINGS" TO WHICH THIS COURT HAS ALLUDED REQUIRE A PUBLIC EMPLOYER TO ADVISE ITS EMPLOYEE THAT HIS STATEMENTS WILL BE PROTECTED BY USE IMMUNITY BEFORE THE EMPLOYER CAN DISCIPLINE HIM FOR REFUSING TO ANSWER JOB-RELATED QUESTIONS.

This case involves a question left open by a series of Supreme Court decisions beginning with *Garrity v. New Jersey*, 385 U.S. 493 (1967). In *Garrity*, this Court defined the Fifth Amendment rights of public employees who are forced to choose between termination and self-incrimination, holding that statements made by employees under threat of discharge are compelled, and thus cannot be used against them in subsequent criminal proceedings. *Id.* at 500. In *Gardner v. Broderick*, 392 U.S. 273 (1968), and *Uniformed Sanitation Men Ass'n v. Comm'r of Sanitation*, 392 U.S. 280 (1968) [hereinafter *Sanitation Men I*], the Court held that public employees may not be terminated for refusing to waive the immunity guaranteed by *Garrity* and answer the employer's questions. *Sanitation Men I*

established, nonetheless, that an employer may require an employee to answer "questions specifically, directly, and narrowly relat[ed] to the performance of [his] official duties on pain of dismissal from public employment *without* requiring relinquishment of the benefits of the constitutional privilege." *Sanitation Men I*, 392 U.S. at 284. In other words, "[P]ublic employees [ ] subject themselves to dismissal if they refuse to account for their performance of their public trust, *after proper proceedings*, which do not involve an attempt to coerce them to relinquish their constitutional rights." *Id.* at 285 (emphasis added).

Garrity and its progeny left unresolved the following issue: When an employer compels an employee to answer questions under threat of discharge, do "proper proceedings" require the employer to advise the employee that any answers he gives cannot be used against him in a subsequent criminal proceeding before the employer can terminate him for refusal to answer? Circuit court decisions addressing this issue are in clear conflict. *See FOP, Lodge No. 5 v. City of Philadelphia*, 859 F.2d 276, 282 (3d Cir. 1988) (explicitly recognizing split in the circuits); *D'Acquisto v. Washington*, 640 F. Supp. 594, 623 (N.D.Ill. 1986) (same).

On one side, the Second and Seventh Circuits hold that the Fifth Amendment mandates such advice and assurance as part of the "proper proceedings" which, according to *Sanitation Men I*, must precede termination for refusal to answer the employer's questions. *United States v. Devitt*, 499 F.2d 135, 141 (7th Cir. 1974), *cert. denied*, 421 U.S. 975 (1975); *Confederation of Police v. Conlisk*, 489 F.2d 891, 894-895 (7th Cir. 1973), *cert. denied sub nom. Rochford v. Confederation of Police*, 416 U.S. 956 (1974);

Uniformed Sanitation Men Ass'n v. Comm'r of Sanitation, 426 F.2d 619, 626-627 (2d Cir. 1970), *cert. denied*, 406 U.S. 961 (1972) [hereinafter "*Sanitation Men II*"]. The Court of Claims and a district court in the Seventh Circuit share this view. *Kalkines v. United States*, 473 F.2d 1391, 1393 (Ct. Cl. 1973); *D'Acquisto v. Washington*, 640 F. Supp. 594 (N.D.Ill. 1986). As the *Conlisk* court explained, "[T]he *Gardner* and *Uniformed Sanitation Men* decisions indicate that a public employer may discharge an employee for refusal to answer where the employer *both* asks specific questions relating to the employee's official duties *and advises the employee of the consequences of his choice*, i.e., that failure to answer will result in dismissal but that answers he gives and fruits thereof cannot be used against him in criminal proceedings." *Conlisk*, 489 F.2d at 894 (emphasis added).

This view is supported by language from this Court's own decisions which speaks of an affirmative grant of use immunity. *See Lefkowitz v. Cunningham*, 431 U.S. 801, 809 (1977) (emphasis added) ("*Once proper use immunity is granted*, the State may use its contempt powers to compel testimony concerning the conduct of public office, without forfeiting the opportunity to prosecute the witness on the basis of evidence derived from other sources."); *Lefkowitz v. Turley*, 414 U.S. 70, 78, 85 (1973) (emphasis added) ("[A] witness protected by the privilege may rightfully refuse to answer *unless and until he is protected at least against the use of his compelled answers and evidence derived therefrom in any subsequent criminal case in which he is a defendant*. . . . [¶] [A]nswers elicited upon the threat of loss of employment are compelled and inadmissible in evidence. Hence, if answers are to be required in such

circumstances States *must offer to the witness whatever immunity is required to supplant the privilege. . . .* ").

Moreover, this view recognizes that the typical employee is unsophisticated in legal affairs and cannot be expected to know the rules of *Garrity* and its progeny. *See, e.g., Benjamin v. City of Montgomery*, 785 F.2d 959, 962 (11th Cir.), *cert. denied*, 479 U.S. 984 (1986) ("[W]e cannot require public employees to speculate whether their statements will later be excluded under *Garrity*."); *D'Acquisto*, 640 F. Supp. at 624 ("[O]fficers under interrogation are not expected to know the 'ins' and 'outs' of Fifth Amendment law, and they should not have to guess whether or not they have criminal immunity for their statements."). Just as a criminal suspect must be told that he has a right to remain silent and that his statements *can* be used against him, *Miranda v. Arizona*, 384 U.S. 436, 467-469 (1966), an employee protected under *Garrity* must be told that if he chooses to speak, his statements *cannot* be used against him. As this Court has observed, awareness of the privilege against self-incrimination is "the threshold requirement for an intelligent decision as to its exercise." *Id.* at 468.

Under this rule, Jack Ma would have been able to make an informed choice between his options. He could have saved his job by answering TRW's questions, secure in the knowledge that the answers he gave and the fruits thereof could not have resulted in criminal sanctions. Or, he could have chosen to sacrifice his job out of fear that his answers might have been misinterpreted or skewed, and thus might have provoked a criminal prosecution and, potentially, conviction.

On the other side of the split in authority, the Fifth and Eleventh Circuits hold that no affirmative tender of immunity is required before a public employer can fire an employee for refusing to answer questions directly and narrowly related to his duties. *Gulden v. McCorkle*, 680 F.2d 1070 (5th Cir. 1982), *cert. denied*, 459 U.S. 1206 (1983); *Erwin v. Price*, 778 F.2d 668 (11th Cir. 1985); *Hester v. City of Milledgeville*, 777 F.2d 1492 (11th Cir. 1985). According to the Fifth Circuit, "[The] theory that an affirmative tender of immunity was mandated by the holdings of *Lefkowitz I* and *II*, *Sanitation Men* and *Gardner* finds no support in those cases.[6] . . . An employee who is compelled to answer questions (but who is not compelled to waive immunity) is protected by *Garrity* from subsequent use of those answers in a criminal prosecution. It is the very fact that the testimony was compelled which prevents its use in subsequent proceedings, not any affirmative tender of immunity." *Gulden*, 680 F.2d at 1075. This view was implicitly adopted by the California Court of Appeal in this case. Pet. App. at A-33 to A-34.

Jack Ma suffered the consequences of this rule. No one told him statements he might give to TRW could not be used against him in any criminal proceedings. He did not and could not have been expected to know what *Garrity* held because he is not only unsophisticated in legal matters, but also a naturalized citizen with only a limited command of English. Ma refused to answer

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[6] "While Justice Stevens, in dissent in *Lefkowitz II* [*Lefkowitz v. Cunningham*, 431 U.S. 801 (1977)], referred to a 'tender of immunity,' such a requirement has never been an explicit or implicit condition of the relevant holdings." (Original footnote.)

TRW's questions because he honestly feared his answers, misconstrued or slanted as part of a "trump up," could have brought him life imprisonment or death. Consequently, he lost his job and his security clearance.

This Court should not lose sight of the critical fact that Ma was willing to cooperate with his employer and attend the interview. He simply wanted to bring his lawyer along, as he would have been allowed to do if the government itself had been conducting the interview. The Defense Investigative Service Manual for Personnel Security Investigations, which governs security interviews of the type involved here when conducted by the Department of Defense itself, expressly recognizes and honors the interviewee's right to counsel.[7] Supp. Rec. at 38-40.

Moreover, if TRW's suspicions about Ma were confirmed at the interrogation, Ma could have faced a charge of espionage, one of the most heinous federal crimes, which carries possible penalties of death or life imprisonment. 18 U.S.C.A. § 794(a) (West 1976). In light of these grave consequences, surely the Fifth Amendment offered Ma the protection of his own retained counsel. "The Court has held that 'the availability of the [Fifth Amendment] privilege does not turn upon the type of proceeding in which its protection is invoked, *but upon the nature of the statement or admission and the exposure which it invites.*' " *Estelle v. Smith*, 451 U.S. 454, 471 (1981) (quoting *In re Gault*, 387 U.S. 1, 49 (1967)) (emphasis added).

It should be stressed that Ma's situation was exceptionally perilous. Thus, Ma seeks a limited ruling that

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[7] It should also be remembered that Ma had brought his attorney to an earlier meeting with TRW's own lawyer.

when a defense contractor requires an employee to submit to an interrogation because it suspects a crime as serious as espionage, constitutional safeguards must come into play. We do not suggest that *every* interview of an employee by a public employer concerning *any* potential infraction triggers a full panoply of constitutional rights.

In sum, Jack Ma was confronted with the intolerable choice between submitting to TRW's interrogation and risking his liberty or even his life, and refusing to submit and forfeiting his job and livelihood as a physicist. TRW did not inform Ma that his statements could not be used against him in a subsequent criminal proceeding. Moreover, TRW refused to let Ma bring his attorney to the interrogation to help him safeguard his privilege against self-incrimination and exercise it intelligently. The Constitution should not be a passive observer of such a needlessly harsh dilemma.

CONCLUSION

For all the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully Submitted,

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APPENDIX

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Los Angeles County Superior Court's Statement of Decision Following Bench Trial of Right to Attorney Issue A-41

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California Supreme Court's Order Denying Petition for Review A-48

[No. B072479. Second Dist., Div. Four. June 22, 1994.]

TRW, INC., Petitioner, v.
THE SUPERIOR COURT OF
LOS ANGELES COUNTY, Respondent;
JACK MA, Real Party in Interest.

SUMMARY

A physicist employed by a defense contractor was suspended and then fired after he refused to attend an internal security interview without an attorney. His failure to attend and his alleged contacts with foreign nationals were reported to the Federal Bureau of Investigation by the contractor. The physicist sued the contractor for tortious termination, breach of the implied covenant of good faith and fair dealing, and malicious prosecution. Both parties filed evidentiary motions *in limine*. The trial court ruled that the contractor was a "government actor" when it ordered the physicist to attend the interview, that he was entitled to an attorney at the interview, and that his termination violated the public policy behind the privilege against self-incrimination. (Superior Court of Los Angeles County, No. SWC96472, Harry T. Shafer, Judge.*)

The Court of Appeal issued a writ of mandate directing the trial court to vacate its orders, and to make a new and different order that defendant was not a government actor and that plaintiff did not have a constitutional right

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*Retired judge of the Los Angeles Superior Court sitting under assignment by the Chairperson of the Judicial Council.

to counsel at the interview. The court held that the conduct of the defense contractor, a private person, was not rendered governmental conduct by its contract with the federal government, which required it to report potential breaches of security but did not specify how preliminary inquiries were to be conducted. Even if the contractor were treated as a governmental employer, the court held, the proposed interview did not involve custodial interrogation so as to entitle the employee to the presence of an attorney, and the employee's termination did not violate public policy by punishing him for asserting the privilege against self-incrimination. (Opinion by Vogel (C. S.), J., with Hastings, J., concurring. Separate concurring and dissenting opinion by Woods (A. M.), P.J.)

HEADNOTES

Classified to California Digest of Official Reports

(1) **Mandamus and Prohibition § 61 – Mamdamus – Procedure – Alternative Writ – At Direction of Supreme Court.** – A Supreme Court order directing the issuance of an alternative writ is a determination that the petitioner is without an adequate remedy and nothing more. It is not an indication that the Supreme Court has found that the petitioner is correct on the merits.

(2) **Criminal Law § 119 – Interrogation – Advisement of Constitutional Rights – Private Person's Duty: Employer and Employee § 5 – Contracts of Employment – Mutual Duties and Rights – Right of Defense Contractor's Employee to Have Counsel Present at Security Interview.** – In a wrongful termination action by an employee against a defense contractor, the trial court erroneously ruled that the

contractor's refusal to allow the employee to bring his attorney to a security interview was subject to constitutional restraint on the ground that the contractor was a "government actor." Ordinarily, U.S. Const., 5th Amend., rights are secured only against intrusions by the government, not by private persons. Government agents did not participate in the contractor's security interviews, and the Department of Defense's internal security manual did not specify how preliminary inquiries into security breaches were to be conducted. Absent evidence that the government required or encouraged the denial of counsel, the contractor's private conduct was not transformed into governmental action merely because it was contractually obligated to make an inquiry, or because its possession of classified information was subject to regulation.

(3a, 3b) **Criminal Law § 119 – Interrogation – Advisement of Constitutional Rights – Private Person's Duty – Necessity of Custodial Interrogation: Employer and Employee § 5 – Contracts of Employment – Mutual Duties and Rights – Right of Defense Contractor's Employee to Bring Counsel to Security Interview.** – In a wrongful termination action by an employee against a defense contractor, the trial court erroneously ruled that the contractor's refusal to let the employee bring his attorney to a security interview violated the employee's right to counsel under U.S. Const., 5th Amend. The right to the presence of counsel does not arise in the absence of custodial interrogation, meaning formal arrest or similar loss of freedom of movement. The employee's fear that he could lose his job or security clearance, or be subject to future criminal investigation, did not make the interview a custodial one. No reasonable person could conclude that the proposed interview, which the employee refused to attend,

would have been custodial; employees were not detained, government agents did not participate, the employee admitted knowing that he could not be detained, and he subsequently spoke to a Department of Defense agent without his lawyer.

[What constitutes "custodial interrogation" within rule of Miranda v Arizona requiring that suspect be informed of his federal constitutional rights before custodial interrogation, note, 31 **A.L.R.3d** 565.]

(4) **Criminal Law § 615 – Appellate Review – Questions of Law and Fact – Whether Interrogation Is Custodial.** – The test of whether the circumstances of an interrogation are custodial is an objective one, based on what a reasonable person in the suspect's circumstances would perceive. This is a mixed question of law and fact, as to which the appellate court exercises its independent conclusion on the legal question of reasonableness, based on the facts as found by the trial court if supported by substantial evidence.

(5) **Public Officers and Employees § 30 – Removal from Office – Refusal to Answer Questions Related to Duties: Employer and Employee § 9 – Wrongful Discharge – Employee's Refusal to Attend Security Interview.** – In a wrongful termination action against a defense contractor by an employee who was fired for refusing to attend a security interview without his attorney, the employee could not rely on his constitutional right to remain silent at the security interview to show a violation of public policy by the contractor. Even if the contractor were treated as a governmental employer, a public employer may terminate a public employee who refuses to answer questions directly and specifically related to performance of the employee's duties. An employee's right

against self-incrimination is adequately protected by precluding use of his or her statements in a criminal proceeding; the loss of his or her job is not barred if it is imposed for failure to answer a relevant inquiry and not for refusal to give up a constitutional right. Thus, the contractor had the right to question the employee about alleged security breaches committed in the course of his employment; the employee could refuse to answer, but his resulting termination did not violate public policy.

[See 2 **Witkin,** Summary of Cal. Law (9th ed. 1989) Agency and Employment, § 188.]

COUNSEL

Munger, Tolles & Olson, Terry E. Sanchez and Gary D. Roberts for Petitioner.

No appearance for Respondent.

Horvitz & Levy, George P. Schiavelli, Allan F. Grossman and Ellis J. Horvitz for Real Party in Interest.

OPINION

VOGEL (C. S.), J. – TRW, Inc., petitioned this court for a writ of mandate seeking relief from the trial court's orders that TRW was a government actor when it requested an interview of an employee regarding an alleged violation of security regulations and that an employee has a Fifth Amendment right to counsel at any such interview. The trial court's rulings were in response to motions *in limine* of the real party in interest, Jack Ma, who filed this action for tortious termination. The trial

has been stayed by agreement of the parties and pending review of this matter.

Factual Background

TRW's Security System

TRW is a privately owned company and a defense contractor producing goods and services for the United States Government. Some government contracts involve classified information and require TRW to sign a separate contract with the Defense Investigative Service (DIS), an administrative agency within the Department of Defense. The contract with DIS obligates TRW to safeguard classified information and to maintain a security system in accordance with the DIS's Industrial Security Manual (ISM). The ISM provides that TRW report information coming to its attention of any of its employees who have been cleared for access to classified information indicating such access may not be clearly consistent with the national interest.

To fulfill its obligations according to the ISM, TRW is required to establish procedures to allow employees to report the loss, compromise, or suspected compromise of classified information to TRW's Facility Security Officer (FSO).[1] If a suspected compromise is reported, TRW is required to report it to the Defense Industrial Security Clearance Office (DISCO) and must initiate a preliminary inquiry to ascertain the circumstances surrounding the

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[1] The FSO is appointed by TRW to supervise and direct security measures according to United States Government standards for classified material.

suspected compromise. If the preliminary inquiry confirms that a suspected compromise of classified information occurred, then TRW is required to make a report of the incident to the Cognizant Security Office (CSO)[2] and the FBI and undertake a complete investigation unless directed not to do so by the CSO.

The procedures for implementing reporting preliminary inquiries and investigations for any suspected breaches of security are established by TRW, subject only to periodic audits by DIS to verify their effectiveness.[3]

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[2] The CSO is the Office of the Director of Industrial Security for DIS for the appropriate geographical area for the facility.

[3] The ISM provides in relevant part:

"6. *Reports.*

"a. The contractor shall immediately submit in writing to the CSO a report of any of the following.

"(1) *Espionage, Sabotage, or Subversive Activities.* The contractor shall submit an information copy of any report filed under paragraph 6c with the FBI.

"(2) *Loss, Compromise, or Suspected Compromise.* The contractor shall submit a report, classified, if appropriate, of any loss, compromise (including deliberate compromise), or suspected compromise of classified information.

"(3) *Other Security Violations.* The contractor shall submit a report, in addition to the requirement of paragraph (2) above, classified, if appropriate, of each violation of the requirements of this manual involving TOP SECRET or special access information, RESTRICTED DATA, or COMSEC information, regardless of classification, which the contractor possesses in connection with UA contracts or programs.

". . . .

"b. For all cleared personnel, the contractor shall submit the following reports immediately to the DISCO, Columbus, Ohio 43216, unless the individual involved is or was required to be cleared in connection with the FCL pursuant to paragraph 22, in which case the report will be submitted to the CSO.

Compliance with the established procedures is administered and executed entirely by TRW employees.

"(1) *Adverse Information.* Contractors shall submit reports, classified, if appropriate, of any information coming to their attention concerning any of their employees who have been cleared or who are in the process of being cleared for access to classified information, which indicate that such access or determination may not be clearly consistent with the national interest. . . .

". . . .

"7. *Loss, Compromise, or Suspected Compromise of Classified Information.*

"a. The contractor shall establish a procedure to ensure that each loss, compromise, or suspected compromise of classified information and each failure to comply with a requirement of this manual is immediately reported to the FSO. . . .

"b. The contractor shall establish such procedures as are necessary to ensure that any employee discovering the loss, compromise, or suspected compromise of classified information outside a facility promptly reports such a fact to:

"(1) the nearest office of the FBI, and furnishes sufficient information to assist in identification of the information – if the loss, compromise, or suspected compromise occurs outside of the U.S., the nearest U.S. authorities shall be notified in lieu of the FBI; and

"(2) the FSO, by the fastest means of communication, who will then comply with paragraph c below.

"c. Immediately on receipt of a report, in accordance with paragraphs a or b above, the contractor shall initiate a preliminary inquiry to ascertain all of the circumstances surrounding the reported loss, compromise, suspected compromise, or failure to comply with a requirement of this manual. In the event of loss, a thorough search shall be conducted for the classified material.

"d. If the contractor's inquiry prescribed in paragraph c above confirms: (i) that a loss, compromise, or suspected compromise of any classified information occurred . . . , the contractor immediately shall submit a report of the incident to the CSO

Members of TRW's security department do not make arrests, carry weapons, or wear uniforms or law enforcement badges, and the ISM does not require or authorize them to do so. There is no participation by government agents in TRW's preliminary inquiries pertaining to a suspected compromise of security. Other factual references to TRW's security program will be provided in the analysis of the issues that follow.

Preliminary Inquiry About Ma

The real party in interest, Jack Ma, was hired as a physicist by TRW in January of 1985. He obtained the necessary security clearance and was assigned to the Electromagnetic Survivability and Vulnerability Department (ESV) involving the protection from nuclear attack. Ma was initially assigned to a section under the supervision of Dr. Tim Rynne. In June of 1985, over his objection, Ma was reassigned to another section supervised by Dr. Mike Schmidt.

In November 1985, the head of the ESV, Charles S. Wuller, was contacted by TRW employee George Hoffman who expressed concerns that Ma may have violated security regulations and exhibited bizarre behavior. The following day, Hoffman sent Wuller a follow up memorandum reporting that Ma had made telephone contacts with foreign nationals and had been heard using the

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in accordance with paragraph 6a(2) or 6a(3), as appropriate, and conduct a complete investigation of the incident unless otherwise notified by the CSO. Submission of the report shall not be deferred pending completion of the contractor's investigation." (Fns. omitted.)

terms and phrases " 'warheads,' " " 'silo penetration,' " " 'space weaponry,' " and " 'TRW is working on. . . . ' " Hoffman's report also states that Ma informed another TRW employee he "is 'working on a system that would cause hostile missiles to turn around and return to the point of launch and explode,' " and that Ma is program manager of 100 to 1000 persons on a project to analyze "trajectory reversal." The memorandum attributes to Ma the claim that he traveled to Europe to meet with "non-US" nationals to discuss quantum gravity reversal and is a sales agent shipping computer hardware to Europe. Hoffman had expressed his concerns about Ma to section heads Schmidt and Rynne in mid-July, several months before contacting Wuller.

Wuller regarded Hoffman's report about Ma as an indication of "[an] alleged security violation[] and . . . bizarre behavior." He consulted with the director of personnel, Karen D. Wolff. Wuller was not satisfied that Ma had committed any violation of security since the terms and phrases attributed to him appeared in newspapers and magazines. He was more concerned about Ma's failure to report his purported contacts with foreign nationals. Although he thought the incident was "sort of a red flag," he did not believe Ma had committed any crime and did not report the incident to any law enforcement agencies. However, Wuller sent Hoffman's memorandum to TRW's security department asking for an investigation and determination if any action should be taken with regard to Ma's clearance and access to secret material.

Wuller summoned Ma to his office and met with him, Schmidt, and Wolff. Wuller inquired if Ma was ill or

having any personal problems and carried on a brief conversation about quantum gravity. Wuller asked Ma to see Valerie Miller, a TRW nurse. Wuller never told Ma anything regarding his alleged violation of security regulations.

When Ma met with Miller, he thought she was an ombudsman and did not realize she was in TRW's medical department. She indicated she was aware of some controversy between Ma and Schmidt and asked for information about it. Ma told her Schmidt was stonewalling him on Ma's request for classified materials.

Miller informed Ma an appointment had been made for him to see a TRW psychiatrist, Dr. Purchard, that afternoon and to not report to work on the following Monday. Ma doubted Miller's directions and telephoned Wuller, who told Ma to see Dr. Purchard that evening and they would contact him about returning to work after they received the psychiatrist report.

Ma was disturbed about the way he was treated. He did not know Miller was a nurse when he was referred to her and was unaware that anyone scheduled an appointment for him to see a psychiatrist. He was apprehensive about the suggestion that he was mentally ill and he was concerned he might end up in a mental institution. He thought it was "probably a trump up" and cancelled his appointment with Dr. Purchard and considered hiring a lawyer.

On Monday, he went to TRW to see Dr. Plebuch, the head of the laboratory and Wuller's boss. A meeting with Plebuch took place with Wuller and Wolff in attendance. Ma informed Plebuch about his difficulties at work and

the direction to see a psychiatrist before returning to work. Dr. Plebuch told Ma to not return to work until he was contacted. On Wednesday, Ma received a certified letter from TRW advising him that "management" referred him to Dr. Purchard for an evaluation and "suggest[ed]" he schedule an appointment by the following Friday. The letter further advised him, until the medical report is "evaluated, you should not report for work." Instead of following TRW's suggestion, Ma engaged a lawyer, Dennis A. Devermont.

Devermont contacted TRW and arranged a meeting among Ma, Devermont, and TRW's lawyer, Inese B. Lacey. Lacey opened the meeting by mentioning that she had heard about Ma's controversy with his supervisor. Ma essentially repeated what he had told Miller about his relationship with Schmidt and the difficulty he had obtaining access to documents. She inquired if Ma had filed a complaint with the grievance committee. Ma responded "no" and that he did not even know of any such committee. The meeting lasted three hours, but, again, no mention was made of any concern about a violation of TRW's security regulations.

Following the meeting with Lacey, Ma received a telephone call from Earl Nishimura of TRW's security department asking Ma to attend an interview. Nishimura told Ma that he had "sort of an obligation to come in and speak to us regarding foreign contacts" but "this was not a criminal investigation." Ma told Nishimura he had a lawyer who was handling the matter "[and] you are not supposed to talk to me, and you should talk to my lawyer." Nishimura telephoned Devermont and told him he wanted to interview Ma regarding an "investigation

into the allegation for the violation of the company rules, regulations, and procedures and that there was no criminal investigation involved and that an attorney was not necessary." Devermont advised Nishimura Ma would attend an interview accompanied by his counsel, but not otherwise, and later confirmed Ma's position in a letter to TRW's lawyer: "Jack Ma and myself would be more than happy to attend a meeting where Mr. Ma could be questioned about security violations." TRW viewed the requested interview as an internal investigation of Ma's failure to report alleged contacts with foreign nationals and Ma's failure to attend as a lack of cooperation, contrary to a condition of his employment.

On December 13, 1985, TRW's personnel manager sent Ma a letter about his failure to meet with the security department on December 12 to "answer questions regarding alleged security violations committed by you." The letter directed Ma to contact Nishimura for an appointment no later than December 20 and informed him that he had been suspended without pay. When Ma did not attend on December 12, Nishimura contacted an FBI agent and informed him of the allegations about Ma's contacts with foreign nationals and his failure to attend an interview. Nishimura stated his reason for doing this was to protect himself and not because he believed any crime had been committed.

Suspension and Termination of Ma

When Ma had not contacted Nishimura to arrange an interview by December 20, 1985, TRW sent DISCO a report pursuant to ISM paragraph 6b(1) advising TRW

had received information that Ma had made contact with foreign nationals. The report informed DISCO that TRW began an investigation which revealed that Ma informed coworkers of "such encounters and has been heard to use phrases and wording vernacular such as " 'silo penetration,' " " 'war heads,' and 'space weaponry.' " The letter further reported that Ma refused to appear for a requested interview and that he was suspended.

In March 1986, Ma was contacted by DIS and requested to attend an interview regarding alleged security violations. He did not contact his lawyer about the interview and met with an agent of the Department of Defense unaccompanied by counsel. Ma was aware the interview covered the same subject matter Nishimura of TRW wanted to discuss when he asked for a meeting. Ma explained that he met the government agent because the agent was not paid by TRW and because he told the agent he would contact his lawyer if he felt the interview was not being fairly conducted. The agent prepared a statement of the information Ma gave him. Ma reviewed, corrected, and signed it without the presence or advice of his lawyer.

In December 1987, Ma's suspension became permanent and he was terminated for insubordination. Ma commenced the present action against TRW. On March 19, 1991, Ma filed his second amended complaint alleging tortious termination based on public policy, breach of the implied covenant of good faith and fair dealing, and malicious prosecution. TRW filed its answer denying Ma's allegations and asserted numerous affirmative defenses on July 23, 1991.

PROCEDURAL BACKGROUND

Both TRW and Ma filed motions *in limine* addressing the admission or exclusion of evidence and for the determination of the following issues of law: (1) was TRW acting as a government agent; (2) did Ma have a Fifth Amendment right to the representation of counsel at the interview requested by TRW's security department; and (3) did Ma's termination violate a firmly established public policy under *Tameny v. Atlantic Richfield Co.* (1980) 27 Cal.3d 167 [164 Cal.Rptr. 839, 610 P.2d 1330, 9 A.L.R.4th 314].

On December 29, 1992, the trial court filed its statement of decision holding (1) as a matter of law, TRW " 'was a government actor in ordering [Ma] to attend the proposed security interrogation' "; (2) there is an established public policy that on or before November 1985, a person ordered to attend a security interrogation to be conducted in custodial setting which has focused upon him as a criminal suspect and has reached the accusatory stage is entitled to an attorney and the denial thereof is a violation of his federal and California constitutional rights and privileges against self-incrimination; (3) "[a]t the time of the proposed security interrogation, the investigation had focused upon [Ma] as a criminal suspect and had, therefore, reached the accusatory stage"; (4) "[t]he interrogation to which [Ma] was ordered to go upon penalty of losing his job was custodial."[4]

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[4] The trial court's orders the TRW was a government actor and that an individual has a constitutional right to counsel at a security "interrogation" were made as a matter of law. The orders that Ma was a criminal suspect and that an accusatory

TRW filed a petition for writ of mandate in this court alleging it had no plain, speedy, or adequate remedy at law because it could not otherwise avoid a costly, protracted, and perhaps unnecessary trial and appeal and retrial based on its position that the trial court's orders are erroneous and would result in fundamental instructional error. TRW further contended that the trial court's orders threatened to place the entire defense industry into a state of great uncertainty impairing its members' ability to conduct business and safeguard classified information. **(1)**(see fn. 5.) We denied the petition and TRW petitioned for review in the Supreme Court, and the matter was retransferred to us with directions to issue an alternative writ. (Code Civ. Proc., § 1087.)[5]

CONTENTIONS

Ma's tort cause of action alleges that his termination was in violation of public policy. (*Tameny v. Atlantic Richfield Co. supra,* 27 Cal.3d 167, 177.) The public policy which he claims was violated is the privilege against self-incrimination in the Fifth Amendment of the United States Constitution, as implemented by the right to the presence of an attorney at a custodial interrogation under

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stage had been reached and that the proposed "interrogation" was custodial were in the nature of findings based on "oral and documentary" evidence and would be binding on the jury.

[5] An order of the Supreme Court directing an alternative writ be issued is a determination that the petitioner is without an adequate remedy and nothing more. It is not an indication that the Supreme Court has found that the petitioner is correct on the merits. (*Bridgestone/Firestone, Inc. v. Superior Court* (1992) 7 Cal.App.4th 1384, 1389, fn. 4 [9 Cal.Rptr.2d 709].)

Miranda v. Arizona (1966) 384 U.S. 436 [16 L.Ed.2d 694, 86 S.Ct. 1602, 10 A.L.R.3d 974]. Ma contends that although the Fifth Amendment ordinarily applies only to governmental action, TRW was a "federal government actor" in the circumstances of this case, subject to the constraints of the Constitution. He contends that the proposed internal security interview "would have been" the type at which he had a constitutional right to the presence of an attorney to implement his privilege against self-incrimination. Therefore, he contends, TRW's termination of his employment because he refused to attend the interview without an attorney violated an established public policy under the Fifth Amendment of the United States Constitution. In its rulings on the motions *in limine*, the trial court agreed with Ma on each of these issues, as a matter of law.

We conclude to the contrary, and direct the trial court to vacate its orders. The conduct of TRW, a private person, was not rendered governmental conduct by TRW's contract with the United States. Furthermore, even if TRW were treated like a governmental employer, the proposed interview did not involve custodial interrogation which would have invoked the *Miranda* right to the presence of an attorney, nor was Ma's termination an unlawful punishment for asserting the privilege against self-incrimination. TRW's conduct did not violate an established public policy.

DISCUSSION

Governmental Actor

(2) The public policy asserted as the basis for Ma's cause of action for wrongful termination in violation of public policy is the Fifth Amendment of the United States Constitution. TRW is a private corporation. Ordinarily, the rights in the Fifth Amendment are secured against intrusions only by the government, not by private persons. (*Flagg Bros., Inc. v. Brooks* (1978) 436 U.S. 149, 156 [56 L.Ed.2d 185, 193, 98 S.Ct. 1729].) The trial court nevertheless found that TRW's refusal to allow Ma to bring his attorney to the proposed security interview was subject to constitutional constraint on the ground that TRW was in this respect a "federal government actor." The court based its order on the following theories: (1) TRW was performing a public function, i.e., nuclear weaponry and national defense, (2) TRW was required by the ISM to make inquiry into Ma's suspected compromise of security, and (3) TRW and the Department of Defense were in a "symbiotic relationship," "close nexus," or "joint venture" regarding protection of national military secrets and detection of violations.

Ma relies primarily on *Burton v. Wilmington Pkg. Auth.* (1961) 365 U.S. 715 [6 L.Ed.2d 45, 81 S.Ct. 856], where a privately owned restaurant which engaged in racial discrimination was an integral part of a state-owned public parking facility which depended upon rental income from the restaurant to service the public debt incurred to build the facility. The court held a patron denied service at the restaurant could obtain injunctive relief, despite the claim the restaurant owner's conduct

was purely private, because under the particular circumstances of the lease "[t]he State has so far insinuated itself into a position of interdependence with [the restaurant] that it must be recognized as a joint participant in the challenged activity." (*Id.* at p. 725 [6 L.Ed.2d at p.52].) Ma notes that in *Holodnak v. Avco Corp., Avco-Lycoming Div., Stratford* (2d Cir. 1975) 514 F.2d 285, 287, 289, *Burton* was applied to a defense contractor who operated a plant on land owned by the United States, with equipment owned by the United States, subject to close supervision by federal employees on the premises. Under those circumstances, the court held the private contractor must observe the First Amendment free speech rights of the contractor's employee.

In the years since *Burton*, the United States Supreme Court has tended to limit *Burton*[6] and to focus more narrowly on the involvement of the government in the particular decision about which a plaintiff complains. (*Jackson v. Metropolitan Edison Co.* (1974) 419 U.S. 345, 351, 358 [42 L.Ed.2d 477, 484, 488, 95 S.Ct. 449] [fact that private utility is subject to heavy regulation is not sufficient to convert its action to state action; describes *Burton's* holding as limited to lessees of public property];

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[6] Further, the court in *United States v. Solomon* (2d Cir. 1975) 509 F.2d 863, 871, commented that even in a *Burton*-type lease, "It is one thing to say that the exclusion of blacks is no more permissible for a restaurant which is a lessee of a state parking authority than it would be for the authority itself; it would be altogether different to say that a lease of state property carries the privilege against self-incrimination on its back . . . if the proprietor of the Eagle Coffee Shoppe had interrogated a waiter suspected of snatching a patron's purse."

Lugar v. Edmondson Oil Co. (1982) 457 U.S. 922, 937-938 & fn. 19 [73 L.Ed.2d 482, 495-496; 102 S.Ct. 2744] [official involvement in seizure of debtor's property].) in *Lugar,* the court said, "First, the deprivation must be caused by the exercise of some right or privilege created by the State or by a rule of conduct imposed by the state or by a person for whom the State is responsible. . . . Second, the party charged with the deprivation must be a person who may fairly be said to be a state actor." (457 U.S. at p. 937 [73 L.Ed.2d at p. 495].)

In two cases decided contemporaneously with *Lugar,* the court found insufficient governmental coercion, encouragement, or involvement with the particular decisions of private actors. One of these, as here, was an employment termination case. In *Rendell-Baker v. Kohn* (1982) 457 U.S. 830 [73 L.Ed.2d 418, 102 S.Ct. 2764], a vocational counselor was fired from a position in a private nonprofit school, to which maladjusted students were referred by public school districts pursuant to state law. The school was heavily regulated and received almost all its funds from public sources. The plaintiff alleged she was discharged from employment without due process because she exercised First Amendment rights. The court found no state action in the decision to terminate the employee. The court first noted that "The school . . . is not fundamentally different from many private corporations whose business depends primarily on contracts to build roads, bridges, dams, ships, or submarines for the government. Acts of such private contractors do not become acts of the government by reason of their significant or even total engagement in performing public contracts." (*Id.* at pp. 840-841 [73 L.Ed.2d at p.

427].) The court held, "Here the decisions to discharge the petitioners were not compelled or even influenced by any state regulation. . . . The most intrusive personnel regulation promulgated by the various government agencies was the requirement that the Committee on Criminal Justice had the power to approve persons hired as vocational counselors. Such a regulation is not sufficient to make a decision to discharge, made by private management, state action." (*Id.* at pp. 841-842 [73 L.Ed.2d at p. 428].)

The court drew a similar distinction in *Blum v. Yaretsky* (1982) 457 U.S. 991 [73 L.Ed.2d 534, 102 S.Ct. 2777]. There Medicaid patients in nursing homes challenged on due process grounds a decision to transfer them to a lower level of care. The transfer decisions were made by a review committee of attending physicians, but the plaintiffs argued state action was involved because government regulations encouraged transfers and because government benefits were reduced upon transfer. The court stated the purpose of the rule that there be a sufficiently close nexus between the state and the challenged action is "that constitutional standards are invoked only when it can be said that the State is *responsible* for the specific conduct of which the plaintiff complains." (*Id.* at p. 1004 [73 L.Ed.2d at p. 546], italics in original.) Second, the court said, "although the factual setting of each case will be significant, our precedents indicate that a State normally can be held responsible for a private decision only when it has exercised coercive power or has provided such significant encouragement, either overt or covert, that the choice must in law be deemed to be that

of the State." (*Ibid.*) Construing the statute and regulations, the court rejected the plaintiffs' argument that the government affirmatively commanded the transfers. (*Id.* at pp. 1005-1009 [73 L.Ed.2d at pp. 547-550].) "Those decisions ultimately turn on medical judgments made by private parties according to professional standards that are not established by the State." (*Id.* at p. 1008 & fn. 19 [73 L.Ed.2d at p. 549].)[7]

The court followed *Blum's* reasoning in a later case, *San Francisco Arts & Athletics v. U.S.O.C.* (1987) 483 U.S. 522 [97 L.Ed.2d 427, 107 S.Ct. 2971]. There the United States Olympic Committee, a private corporation created by federal law, exercised its statutory power to restrain the plaintiff from using the word "Olympic" in plaintiff's event. The court found no state action in this conduct so as to give rise to a Fifth Amendment claim. Citing *Blum* and *Rendell-Baker,* the court said, "The USOC's choice of how to enforce its exclusive right to use the word 'Olympic' simply is not a governmental decision. [Fn. omitted.] There is no evidence that the Federal Government coerced or encouraged the USOC in the exercise of its right." (*Id.* at p. 547 & fn. 29 [97 L.Ed.2d at p. 455].)

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[7] Unlike *Rendell-Baker* and the instant case, the private parties were not defendants in *Blum;* the plaintiffs sued governmental defendants. Nevertheless, the court found the private party precedents instructive, and cited them interchangeably. (*Blum v. Yaretsky, supra,* 457 U.S. at pp. 1003-1004 [73 L.Ed.2d at pp. 545-546].) In *Rendell-Baker,* the court relied in turn upon *Blum.* (*Rendell-Baker v. Kohn, supra,* 457 U.S. at pp. 839-841 [73 L.Ed.2d at pp. 426-428].)

Applying these precedents here, we conclude TRW's decision not to allow Ma's attorney to attend the interview was a private decision not involving federal government action. The evidence is uncontradicted that government agents did not participate in TRW's internal security interviews of employees. Robert Schwalls, former deputy director of DIS, declared: "DIS does not participate in, coordinate with or direct a contractor's internal security investigations, even if they are conducted by the contractor to aid in its compliance with its reporting obligations under the ISM. Each contractor initiates, coordinates, and directs its own security investigations." Ma points out that the government offered contractors a training course on compliance with the ISM, but the evidence showed this training course included nothing about how to conduct preliminary investigations.

Although paragraph 7(c) of the ISM required TRW to "initiate a preliminary inquiry to ascertain all of the circumstances surrounding the reported loss, compromise, suspected compromise, or failure to comply with a requirement of this manual," the ISM did not specify *how* this preliminary inquiry was to be conducted. The ISM did not even specifically require that an interview of the suspected employee be conducted much less mention the presence of counsel. Despite a myriad of detailed procedures specified in the ISM, Ma points to none which gives any direction concerning the participation of a lawyer.

In the absence of evidence that the government required or encouraged the particular deprivation of which Ma complains, TRW's private conduct was not transformed into governmental action constrained by the

Fifth Amendment merely because TRW was contractually obligated to make some inquiry. (*Blum v. Yaretsky, supra,* 457 U.S. at p. 1004 [73 L.Ed.2d at pp. 546-547]; *Rendell-Baker v. Kohn, supra,* 457 U.S. at p. 851 [73 L.Ed.2d at p. 434]; *San Francisco Arts & Athletics v. U.S.O.C., supra,* 483 U.S. at p. 546 [97 L.Ed.2d at pp. 454-455]; *Pinhas v. Summit Health, Ltd.* (9th Cir. 1990) 894 F.2d 1024, 1034 [no state action in revocation of physician's staff privileges by private hospital's peer review committee; although the peer review procedure was mandated by government, the particular decision to remove the physician was a private decision based on professional judgments].)

This conclusion is consistent with two cases upon which Ma heavily relies, which are distinguishable. Ma points especially to *Becker v. Philco Corporation* (4th Cir. 1967) 372 F.2d 771, because that case likewise involved a defense contractor and the ISM. There the court held that in making the report to the government which is required by paragraph 6(b) of the ISM, the contractor was immune from liability for defamation. (*Id.* at pp. 773-774.) That case is different because the ISM mandatorily required that even mere suspicion be reported to the government. (*Id.* at p. 774.) Here, the ISM required an inquiry, but did not mandate the particular conduct of which Ma complains. Ma also cites *United States v. Davis* (9th Cir. 1973) 482 F.2d 893, an airport search case in which the action of a private air carrier was held directed by the federal government, and hence subject to the Fourth Amendment. There, however, the search of a boarding passenger's carry on luggage was *specifically* mandated by federal regulations. (*Id.* at pp. 901, 902, & fn. 24.) *Davis* was distinguished on this ground in *United States v.*

Gumerlock (9th Cir. 1979) 590 F.2d 794, 796-797, where an air carrier's search of *freight* was held private conduct not mandated by the government's program for passengers' *carry on* luggage.

Thus, even though TRW's possession of classified information is subject to regulation by TRW's contractual relation with the federal government, TRW's conduct in this case was private, not specifically required or encouraged by the government, and was not subject to the Fifth Amendment. In a slightly different but analogous context of the Federal Tort Claims Act, under which the federal government is liable for the conduct of its employees but not the conduct of contractors, the Supreme Court commented, "Billions of dollars of federal money are spent each year on projects performed by people and institutions which contract with the Government. These contractors act for and are paid by the United States. They are responsible to the United States for compliance with the specifications of a contract or grant, but they are largely free to select the means of its implementation. . . . Similarly, by contract, the Government may fix specific and precise conditions to implement federal objectives. Although such regulations are aimed at assuring compliance with goals, the regulations do not convert the acts of entrepreneurs . . . into federal governmental acts." (*United States v. Orleans* (1976) 425 U.S. 807, 815-816 [48 L.Ed.2d 390, 399, 96 S.Ct. 1971], fns. omitted.)

Ma's Constitutional Claims

We have held that TRW was not a governmental actor and therefore was not subject to the restraint of the Fifth Amendment. We also conclude that, even if TRW were a governmental actor, TRW's conduct did not violate Ma's Fifth Amendment rights and therefore did not violate established public policy.

Presence of Attorney

(3a) Ma contends that TRW's refusal to allow Ma to have his attorney present at the security interview violated established public policy. The public policy which Ma claims was violated by this conduct is the rule of *Miranda v. Arizona, supra,* 384 U.S. 436, 471 [16 L.Ed.2d 694, 721-722], affording a person subjected to custodial interrogation by law enforcement the right to the presence of an attorney during interrogation, in order to effectuate the privilege against self-incrimination. The parties refer to this right as the Fifth Amendment right to counsel, as distinguished from the Sixth Amendment right to counsel, which does not arise until formal criminal proceedings have commenced.

Ma's argument is erroneous because the Fifth Amendment right to the presence of counsel under *Miranda* arises only if the person subjected to interrogation is in *custody,* which has been defined as the equivalent of formal arrest. Ma's argument that other coercive circumstances can substitute for custody is unsupported by the law. Ma's argument that he was, or would have been, subjected to custodial interrogation is unsupported by the evidence.

The court in *Miranda* explained why a suspect subjected to custodial interrogation must be warned of the right to have an attorney present: "The circumstances surrounding in-custody interrogation [incommunicado interrogation in a police-dominated atmosphere] can operate very quickly to overbear the will of one merely made aware of his privilege by his interrogators. Therefore, the right to have counsel present at the interrogation is indispensable to the protection of the Fifth Amendment privilege under the system we delineate today." (384 U.S. at p. 469 [16 L.Ed.2d at pp. 707-721].)

Although a suspect has a Fifth Amendment privilege against self-incrimination even if not in custody, the right to the presence of an attorney to implement that privilege does not arise in the absence of *custodial* interrogation. (*Beckwith v. United States* (1976) 425 U.S. 341, 347 [48 L.Ed.2d 1, 8, 96 S.Ct. 1612]; *U.S. v. Long* (11th Cir. 1989) 866 F.2d 402, 405; *U.S. v. Lennick* (7th Cir. 1990) 917 F.2d 974, 978; *Boulware v. Battaglia* (D.Del. 1972) 344 F.Supp. 889, 902.)

"Custody," for the purpose of triggering the Fifth Amendment right to counsel, is formal arrest or the loss of freedom of movement to the same degree as formal arrest. (*California v. Beheler* (1983) 463 U.S. 1121, 1125 [77 L.Ed.2d 1275, 1279-1280, 103 S.Ct. 3517].) Ma's reliance on language in *Miranda* referring to "freedom of action" is misplaced. Ma argues that the phrase, "in custody or otherwise deprived of his freedom of action in any significant way" (384 U.S. at p. 455 [16 L.Ed.2d at p. 707]), means that coercive or intimidating circumstances, such as the potential loss of a job, might in some circumstances substitute for custody and require the presence of counsel

to prevent the suspect's will from being overcome. The Supreme Court has repeatedly rejected this interpretation of *Miranda's* language. Subsequent cases make clear that freedom of action refers to freedom of physical movement. In *Oregon v. Mathiason* (1977) 429 U.S. 492, 495 [50 L.Ed.2d 714, 719, 97 S.Ct. 711], the suspect was interrogated at a police station but was not under arrest or restricted from leaving. The court rejected the notion that other coercive factors could substitute for physical custody so as to require *Miranda* warnings. "Such a noncustodial situation is not converted to one in which *Miranda* applies simply because a reviewing court concludes that, even in the absence of any formal arrest or restraint on freedom of movement, the questioning took place in a 'coercive environment.' Any interview of one suspected of a crime by a police officer will have coercive aspects to it, simply by virtue of the fact the police officer is part of a law enforcement system which may ultimately cause the suspect to be charged with a crime. But police officers are not required to administer *Miranda* warnings to everyone whom they question. Nor is the requirement of warnings to be imposed simply because the questioning takes place in the station house, or because the questioned person is one whom the police suspect. *Miranda* warnings are required only where there has been such a restriction on a person's freedom as to render him 'in custody.' It was *that* sort of coercive environment to which *Miranda* by its terms was made applicable, and to which it is limited." (*Id.* at p. 495 [50 L.Ed.2d at p. 719], italics in original; *California v. Beheler, supra,* 463 U.S. at pp. 1123-1125 [77 L.Ed.2d at pp. 1278-1280]; *Berkemer v.*

McCarty (1984) 468 U.S. 420, 437 [82 L.Ed.2d 317, 332-333, 104 S.Ct. 3138].)

The fear that Ma could lose his job or security clearance, or be subjected to criminal prosecution as a future result of the interrogation, is insufficient to convert a noncustodial interrogation into a custodial one. (See *United States v. Bowers* (6th Cir. 1984) 739 F.2d 1050, 1055-1056 [suspect feared disciplinary action against professional license if he refused to talk to investigator].) In *United States v. Dockery* (8th Cir. 1984) 736 F.2d 1232, 1234, and *U.S. v. Goudreau* (8th Cir. 1988) 854 F.2d 1097, 1098, employees were directed by their employers to interview with FBI agents. This was held not to change the noncustodial character of the FBI interviews. There are other situations where the suspect may perceive heavy pressure to attend an interrogation, and face unpleasant choices between self-incrimination or other alternatives, but this does not mean the suspect is constitutionally entitled to bring a lawyer to the interrogation. (*United States v. Mandujano* (1976) 425 U.S. 564, 581 [48 L.Ed.2d 212, 225, 96 S.Ct. 1768] [no right to presence of an attorney during questioning by grand jury].) In *Minnesota v. Murphy* (1984) 465 U.S. 420, 433 [79 L.Ed.2d 409, 423, 104 S.Ct. 1136], a probationer had a legal duty to attend an interview and cooperate with his probation officer, and he was questioned about another crime. The court stated "Even a cursory comparison of custodial interrogation and probation interviews reveals the inaptness of the Minnesota Supreme Court's analogy to *Miranda*. Custodial arrest is said to convey to the suspect a message that he has no choice but to submit to the officers' will and to confess. It is unlikely that a probation interview, arranged by

appointment at a mutually convenient time, would give rise to a similar impression. . . . Finally, the coercion inherent in custodial interrogation derives in large measure from an interrogator's insinuations that the interrogation will continue until a confession is obtained. Since Murphy was not physically restrained and could have left the office, any compulsion he might have felt from the possibility that terminating the meeting would have led to revocation of probation was not comparable to the pressure on a suspect who is painfully aware that he literally cannot escape a persistent custodial interrogator." (*Id.* at p. 433 [79 L.Ed.2d at p. 423], citations and fn. omitted.)

Because Ma refused to attend the interview, he obviously was not subjected to actual custodial interrogation. He must argue that the interrogation "would have been" custodial, and that he was terminated for refusing to attend a custodial interrogation without an attorney present. In its statement of decision, the trial court cited various factors for its conclusion the interrogation would have been custodial. These included that Ma feared he was being accused of violating criminal laws relating to national security, that no one told him he would be free to leave the interrogation at any time or that he need not fear arrest, that TRW's policy is to notify the FBI immediately upon obtaining incriminating evidence, and TRW did in fact notify the FBI immediately after Ma's *failure* to attend the interview.

(4) The test whether the circumstances are custodial is an objective one, based on what a reasonable person in the suspect's circumstances would perceive. (*Berkemer v. McCarty, supra,* 468 U.S. at p. 442 [82 L.Ed.2d at p. 336];

Stansbury v. California (1994) 511 U.S. ___ [128 L.Ed.2d 293, 299-300, 114 S.Ct. 1526, 1530].) This is a mixed question of law and fact, as to which the appellate court exercises its independent conclusion on the legal question of reasonableness, based on the facts as found by the trial court if supported by substantial evidence. (See *People v. Leyba* (1981) 29 Cal.3d 591, 597-598 [174 Cal.Rptr. 867, 629 P.2d 961].) **(3b)** Exercising our judgment, we hold that no reasonable person in Ma's circumstances could reasonably conclude the proposed security interview would be custodial as defined by the law, i.e., that if he attended the interview he would be under arrest and not free to leave the interview.

TRW's letters to Ma sought an appointment for an interview as a "condition of employment," but did not refer to arrest. The uncontradicted evidence showed that TRW's internal security officers have no police powers, do not make arrests, and do not wear uniforms or badges or carry guns. TRW's internal security officers do not detain employees during security interviews; the employees are free to leave the interviews. Interviews are conducted in an open cubicle with five-foot high soft partition walls, which have an open doorway. Interviews last from less than a minute, if the employee does not wish to be interviewed, to one hour at the most. Government agents do not participate in TRW's internal security interviews. The FBI was contacted only after Ma failed to attend; the FBI was not contacted to have an agent show up for the interview. If during the course of an internal investigation TRW became aware of the potential of criminal charges, TRW would cease its investigation and

notify the FBI; TRW had no participation in any subsequent investigation by the FBI.

Ma's contention that a reasonable person in his circumstances would have believed he would not be free to leave the interview is belied by his own admissions and conduct. Ma *admitted* knowing that TRW's security investigators could not arrest him and could only make allegations which if proven true could result in future arrest or imprisonment by law enforcement. Furthermore, Ma was subsequently willing to and did talk to a Department of Defense agent without his lawyer present.

The record thus contains no substantial evidence that the proposed security interview would have been custodial as defined by law, so as to invoke the Fifth Amendment right to the presence of an attorney. There was simply no reasonable basis for Ma to believe the requested interview was custodial interrogation. Therefore, TRW did not violate the fundamental public policy of *Miranda* by refusing to permit Ma's attorney to come with him to the proposed interview.

Self-incrimination

(5) Ma contends he "could not constitutionally be compelled to voluntarily respond to TRW's interrogation; he was constitutionally entitled to exercise his Fifth Amendment right to remain silent." He then contends, "the Government has no power to punish an individual for refusing to voluntarily submit to interrogation" and "[t]he loss of his job for asserting [the right to remain silent] violates public policy."

This argument is misconceived. Even if TRW were treated as a governmental employer, a public employer *may* terminate a public employee who refuses to answer questions directly, specifically, and narrowly related to the performance of the employee's duties. (*Gardner v. Broderick* (1968) 392 U.S. 273, 278 [20 L.Ed.2d 1082, 1086-1087, 88 S.Ct. 1913]; *Sanitation Men v. Sanitation Comm'r.* (1968) 392 U.S. 280, 284 & 285 [20 L.Ed.2d 1089, 1092-1093, 88 S.Ct. 1917] [conc. op. of Harlan, J.]; *Lefkowitz v. Cummingham* (1977) 431 U.S. 801, 806 [53 L.Ed.2d 1, 7-8, 97 S.Ct. 2132]; *Asherman v. Meachum* (2d Cir. 1992) 957 F.2d 978, 982; *Erwin v. Price* (11th Cir. 1985) 778 F.2d 668, 670; *Gulden v. McCorkle* (5th Cir. 1982) 680 F.2d 1070, 1075; *DeWalt v. Barger* (M.D.Pa. 1980) 490 F.Supp. 1262, 1271-1272; *Grabinger v. Conlisk* (N.D.Ill. 1970) 320 F.Supp. 1213, 1218; *Pinkney v. District of Columbia* (D.D.C. 1977) 439 F.Supp. 519, 534; *Szmaciarz v. State Personnel Bd.* (1978) 79 Cal.App.3d 904, 914-919 [145 Cal.Rptr. 396].)

The line of cases cited by Ma from *Garrity v. New Jersey* (1967) 385 U.S. 493, 494-497 [17 L.Ed.2d 562, 564-565, 87 S.Ct. 616], to *Lefkowitz v. Turley* (1973) 414 U.S. 70, 85 [38 L.Ed.2d 274, 286, 94 S.Ct. 316], stands only for the proposition that the government may not, upon threat of termination, require a public employee to speak *and* to waive the immunity from use in a subsequent criminal prosecution which would ordinarily attach to such a compelled admission. (*Lefkowitz v. Cunningham, supra,* 431 U.S. at p. 806 [53 L.Ed.2d at pp. 7-8]; *Baxter v. Palmigiano* (1976) 425 U.S. 308, 316-317 [47 L.Ed.2d 810, 820-821, 96 S.Ct. 1551]; *Gulden v. McCorkle, supra,* 680 F.2d at p. 1075.)

Summarized another way by our own Supreme Court, these cases show that a public employee has no constitutional right to "remain silent *free of administrative sanction.* As a matter of constitutional law, it is well established that a public employee has no absolute right to refuse to answer potentially incriminating questions posed by his employer. Instead, his self-incrimination rights are deemed adequately protected by precluding any use of his statements at a subsequent criminal proceeding." (*Lybarger v. City of Los Angeles* (1985) 40 Cal.3d 822, 827 [221 Cal.Rptr. 529, 710 P.2d 329], italics in original.)

As stated in *Asherman v. Meachum, supra,* 957 F.2d at page 982, "The fact that a public employee might face the unpleasant choice of surrendering his silence or losing his job is no bar to an adverse consequence so long as the consequence is imposed for failure to answer a relevant inquiry and not for refusal to give up a constitutional right."

By analogy, Ma's employer, TRW, had the right to question Ma about alleged breaches of security committed by him in the course of his employment. If Ma feared that his answers might tend to incriminate him, he of course could refuse to discuss the matter with his employer; but he cannot in reason or law expect an employer to retain confidence in an employee who refuses to discuss legitimate employer questions about the employee's job performance. There is no evidence TRW sought a waiver of immunity of the type involved in the *Garrity* line of cases. (*Lefkowitz v. Cunningham, supra,* 431 U.S. at p. 806 [53 L.Ed.2d at pp. 7-8].) TRW's termination of Ma for his refusal to respond to legitimate

inquiries about his performance was not in these circumstances a punishment for exercising a constitutional right, and therefore was not a termination in violation of public policy.

Firmly Established Public Policy

TRW alternatively argues that, even if in the circumstances of this case TRW is held a governmental actor and Ma is held entitled to the presence of an attorney at the interview, these would be holdings of first impression and cannot be said to involve "firmly established" public policy so as to support a tort cause of action. (*Luck v. Southern Pacific Transportation Co.* (1990) 218 Cal.App.3d 1, 29 [267 Cal.Rptr. 618].) The trial court denied TRW's motion *in limine* on this point and entered an order that a well-established fundamental public policy was violated by TRW's conduct.

Because we hold, *ante*, that Ma did not have a constitutional right to bring his attorney to the interview, this alternative point would be moot but for the fact that the trial court entered a specific order thereon. In light of our disposition on the merits, this order should also be vacated.

DISPOSITION

Having served its purpose, the order to show cause is discharged. Let a peremptory writ of mandate issue ordering respondent court to vacate its orders of June 16, 1992, which ruled, respectively, that (1) defendant TRW

was a government actor with regard to the subject interview of plaintiff and (2) at the time defendant demanded plaintiff's submission to interrogation the right to counsel at a security interrogation, conducted in a custodial setting and focusing on the person as a criminal suspect, was clearly a well-established public policy and legal right, denial of which is a violation of the privilege against self-incrimination; and to vacate its statement of decision entered December 29, 1992, which ruled that plaintiff had a constitutional right to counsel at the subject interview; and to make a new and different order that defendant TRW, Inc., was not a government actor and that plaintiff did not have a constitutional right to counsel at the interview.

Hastings, J., concurred.

WOODS (A. M.), P.J., Concurring and Dissenting. – The well crafted opinion of the majority has persuaded me that Mr. Ma did not have the right to insist upon having counsel present at the proposed meeting with TRW's security department. There is insufficient evidence to support the trial court's finding that the interrogation would have been sufficiently custodial so as to trigger Mr. Ma's Fifth Amendment right to counsel.

Ma's subjective fears that he might lose his job, his security clearance or be subjected to criminal prosecution if he attended the interview do not, in themselves, convert the interview into a custodial situation without some objective indicia that, had he attended, he would have been deprived of his freedom of movement. There is nothing in the record from which I can conclude that, had the interview fulfilled Ma's fears, he could not have

simply declined to answer any further questions and left. I therefore concur in the disposition of the writ but I dissent from the majority's conclusion that TRW was not a government actor.

The United States Supreme Court's attempt to answer the question of when a private entity can be held to be a state actor has yielded a number of different tests and formulations. (See *Lugar v. Edmondson Oil Co.* (1982) 457 U.S. 922, 939 [73 L.Ed.2d 482, 495-496, 102 S.Ct. 2744].) Consistently, however, the court has emphasized that whatever test is used, the determination is necessarily a "fact-bound inquiry." (*Ibid.; Burton v. Wilmington Pkg. Auth.* (1961) 365 U.S. 715, 722 [6 L.Ed.2d 45, 50, 81 S.Ct. 856] ["Only by sifting facts and weighing circumstances can the nonobvious involvement of the State in private conduct be attributed its true significance."]; *Edmonson v. Leesville Concrete Co.* (1991) 500 U.S. 614, 620-622 [114 L.Ed.2d 660, 673-674, 111 S.Ct. 2077, 2083].)

In the recent *Edmonson* case, the Supreme Court set forth a two-part inquiry for determining when a private entity can be deemed a state actor for purposes of a claimed constitutional deprivation. "We [ask] first whether the claimed constitutional deprivation resulted from the exercise of a right or privilege having its source in state authority, [citation]; and second, whether the private party charged with the deprivation could be described in all fairness as a state actor, [citation]." (*Edmonson v. Leesville Concrete Co., supra,* 500 U.S. at p. 620 [114 L.Ed.2d at p. 673, 111 S.Ct. at pp. 2082-2083].) With respect to the second inquiry, the court suggested certain principles of general application. "[I]t is relevant to examine the following: the extent to which the actor relies on

governmental assistance and benefits, [citations]; whether the actor is performing a traditional governmental function, [citations]; and whether the injury caused is aggravated in a unique way by the incidents of governmental authority, [citation]." (500 U.S. at pp. 621-622 [114 L.Ed.2d at p. 674, 111 S.Ct. at p. 2083].) Applying these principles to the facts of this case, I would conclude that the trial court correctly found TRW to be a state actor for purposes of Ma's claim that he was deprived of his Fifth Amendment right to counsel.

With respect to the first part of the inquiry, it is clear that TRW's investigation of Ma was pursuant to the exercise of a right originating in state authority. The requirement in paragraph 7(c) of the ISM that TRW initiate a preliminary inquiry to ascertain all the circumstances surrounding even the suspicion of the compromise of classified information was clearly a delegation of authority by the federal government to TRW in the defense of the country and its national security, an area over which the federal government exercises hegemony either directly or through its agents. (See *Becker v. Philco Corporation* (4th Cir. 1967) 372 F.2d 771 [defense contractor immune from libel suit of its employees for statements made by employer to United States under terms of a defense contract].)

With respect to the second part of the *Edmonson* inquiry, TRW's status as a defense contractor and the nature of its investigative obligations under the ISM are of such a nature that TRW can be fairly described as a state actor. *Edmonson* directs our consideration to three subfactors, the extent the private authority relies on governmental assistance and benefits; whether the entity is

performing a traditional governmental function; and whether the claimed inquiry is aggravated in a unique way by the incidents of governmental authority. (*Edmonson Leesville Concrete Co., supra,* 500 U.S. at pp. 620-622 [114 L.Ed.2d at pp. 673-674, 111 S.Ct. at p. 2083].) In effect, these subfactors can be collapsed into a single question: Is the private entity performing a function traditionally performed by government for which it reaps a benefit? The answer here is yes. TRW is a defense contractor and reaps a financial benefit from this status. It is true, of course, that, without something more, "[a]cts of such private contractors do not become acts of the government by reason of their significant or even total engagement in performing public contracts." (*Rendell-Baker v. Kohn* (1982) 457 U.S. 830 841 [73 L.Ed.2d 418, 427, 102 S.Ct. 2764].) The something more in this case is that the nature of TRW's work involves the defense of the country and its national security, a function traditionally the exclusive prerogative of the federal government. (*San Francisco Arts & Athletics v. U.S.O.C.* (1987) 483 U.S. 522, 544 [97 L.Ed.2d 427, 453, 107 S.Ct. 2971] ["This Court also has found action to be governmental action when the challenged entity performs functions that have been ' "traditionally the exclusive prerogative" ' of the Federal Government. [Citations.]" (Italics omitted.)]; *Becker v. Philco Corporation, supra,* 372 F.2d 771 [defense contractor immune from defamation action for statements made to the United States under defense contract].) Finally, the specific constitutional violation asserted by Ma of deprivation of his Fifth Amendment right to counsel flows from the investigative responsibilities imposed on TRW

because the investigation was a first step that may have exposed Ma to federal criminal prosecution.

In this connection, I am not persuaded by the majority's assertion that because paragraph 7(c) of the ISM did not specify how the preliminary inquiry was to be conducted, the inquiry did not qualify as state action. This is a distinction without a difference in view of the undisputed fact that the end result of the inquiry might be criminal prosecution. Additionally, *Rendell-Baker v. Kohn, supra,* 457 U.S. 830, on which the majority relies, is easily distinguishable on its facts as is *Blum v. Yaretsky* (1982) 457 U.S. 991 [73 L.Ed.2d 534, 102 S.Ct. 2777]. In neither case did the private entity fulfill the kind of traditional governmental function that was involved here nor were they obligated to perform policing tasks on behalf of the federal government.

I therefore dissent on this issue.

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SUPERIOR COURT OF THE STATE OF CALIFORNIA
FOR THE COUNTY OF LOS ANGELES

JACK MA, Plaintiff, vs TRW, INC., and DOES 1 through 20, inclusive, Defendants.	CASE NO. SWC 96472 STATEMENT OF DECISION FOLLOWING BENCH TRIAL OF RIGHT TO ATTORNEY ISSUE (Cal. Rules of Court 232.5) (Filed Dec. 29, 1992)

After contested hearings on several pretrial motions made by both parties, this court on June 16, 1992, made the following orders:

1. "1. IT IS ORDERED that it is for the court to determine whether defendant's status in conducting its security interrogation is that of a government actor.

"2. IT IS ORDERED that plaintiff's amended motion in limine that the court determine as a matter of law that defendant was a government actor is granted, and it is adjudged that defendant was a government actor

in ordering plaintiff to attend the proposed security interrogation." (Order regarding Defendant's Status as a Government Actor and Plaintiff's Right to an Attorney.)

2. "1. At all time relevant herein, it was on and before November 1985, and is, a clear, well-established, fundamental, and substantial public policy and right embodied in the Fifth and Fourteenth Amendments of the United States Constitution that a person ordered to attend a security interrogation to be conducted in a custodial setting which has already focused upon him as a criminal suspect and has reached the accusatory stage entitled to an attorney at said interrogation, and the denial thereof is a violation of his federal constitutional right and privilege against self-incrimination.

"2. At all times relevant herein, it was on and before November 1985, and is, a clear, well-established, fundamental and substantial public policy and right embodied in Article I, Section 15, Clause 6, of the California Constitution that a person ordered to attend a security interrogation to be conducted in a custodial setting which has already focused upon him as a criminal suspect and has reached the accusatory stage is entitled to have an attorney present at said interrogation, and the denial thereof is a violation of his California constitutional right and privilege against self-incrimination." (Order Regarding the Right to an Attorney in an Accusatory Criminal Interrogation as Being a Well-Established Fundamental Public Policy.)

3. "IT IS ORDERED that the question of plaintiff's right to an attorney at defendant's requested security interrogation is a question for the court to determine

outside the hearing of the jury. This determination will be made prior to the commencement of the jury trial." (Order Regarding the Determination of Plaintiff's Right to an Attorney Question.)

Pursuant to the latter order the matter of plaintiff's right to an attorney at defendant's requested security interrogation came on regularly for trial on August 17, 1992, in Department N of the Southwest District of the above entitled court, the Honorable Harry Shafer, retired judge sitting by assignment. Allan F. Grossman appeared as attorney for plaintiff and Munger, Tolles & Olson, by Terry E. Sanchez and Gary D. Roberts appeared as attorneys for defendant.

After hearing and considering oral and documentary evidence and the written and oral arguments of counsel, and being fully advised in the premises, the court now makes its statement of decision as to each of the principal controverted issues:

1. At the time of the proposed security interrogation, the investigation had focused upon plaintiff as a criminal suspect and had, therefore, reached the accusatory stage. This is based upon the following facts:

(a) Plaintiff's co-workers had reported to management that plaintiff had contacted foreign nationals and used such words as TRW working on [/s/ HS] "silos," "warheads," "survivability," and these alleged [/s/ HS] contacts were reported by management [/s/ HS] to defendant's security personnel.

(b) Defendant's security investigator and personnel manager told plaintiff orally and in writing that he

must come to an interview with its security department investigator to discuss "your alleged security violations" and "contracts with foreign nations" which are a "serious matter" and "would be violations" of defendant's security policies and of the Industrial Security Manual (ISM) issued by the United States Department of Defense. In the context of this case, these facts, events, and occurrences meant that plaintiff was suspected of violating United States criminal laws regarding United States military and nuclear secrets.

(c) After plaintiff refused to go & did not go [/s/ HS] to the interrogation without his attorney, defendant on Dec 12, 1985 [/s/ HS] immediately telephoned the Federal Bureau of Investigation (FBI) and FBI came immediately to TRW. TRW also [/s/ HS] also notified the United States Defense Industrial Security Clearance Office by letter dated 12/20/85 [/s/ HS].

2. The interrogation to which plaintiff was ordered to go upon penalty of losing his job was custodial. This is based upon the following facts:

(a) It was to have been an interrogation.

(b) Defendant's security department works in close cooperation and interaction with and as a conduit to the FBI.

(c) Defendant's security department works in conjunction with and on behalf of [/s/ HS] the FBI.

(d) It is defendant's policy upon securing incriminating evidence to call the FBI immediately and defendant's security personnel did call the FBI immediately upon plaintiff's failure to attend the interrogation.

(e) Defendant's security interrogations usually [/s/ HS] take place in the investigator's office with only the suspect and one or more security interrogators present.

(f) The circumstances of the proposed interrogation would overbear the will of a reasonable person in plaintiff's circumstances and plaintiff, in fact had a reasonable fear that his will would be overborne if he attended the proposed interrogation.

(g) Even though plaintiff told defendant's security investigator that he would not attend the interrogation without his attorney being present, defendant's agents told plaintiff that he must submit to the interrogation alone and without his attorney or else be terminated from his employment with defendant.

(h) Plaintiff did in fact fear and a reasonable person in his circumstances would have feared that if he attended the interrogation alone and without his attorney he would be tricked or coerced [/s/ HS] into giving false answers or that his answers would be changed to his detriment.

(i) Plaintiff had a reasonable fear that he was the target of contrived and spurious charges made by defendant against him.

(j) No one told plaintiff that he would be free to leave the interrogation at any time or that he need not fear arrest.

(k) Plaintiff did in fact fear and a reasonable person in his circumstances would have feared that by going to the interrogation he would lose his liberty.

(l) Plaintiff did assert his right to an attorney at the ordered security interrogation and defendant denied it.

3. Based upon all of the foregoing, including without limitation the orders of June 16, 1992, the court determines that plaintiff did have a right under the Fifth Amendment to the United States Constitution to have his attorney present at the proposed security interrogation ordered by defendant.

4. As an alternative and independent ground of decision, the Court determines, based upon all of the foregoing, including without limitation the orders of June 16, 1992, that plaintiff had a right under article I, section 15 of the California Constitution to have his attorney present at the proposed security interrogation ordered by defendant.

Dated: December 29 1992. /s/ Harry Shafer
HARRY SHAFER
(Retired Judge sitting by assignment)

OFFICE OF THE CLERK
COURT OF APPEAL
STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT
JOSEPH A. LANE, CLERK

DIVISION: 4 DATE: 07/21/94

Horvitz & Levy
Ellis Horvitz
15760 Ventura Blvd.
18th Floor
Encino, CA. 91436

RE: Trw, Inc.
vs.
S.c.l.a.
Ma, Jack
2 Civil B072479
Los Angeles NO. SWC96472

THE COURT:

Petition for rehearing denied.

Second Appellate District, Division Four,
No. B072479-S031407

IN THE SUPREME COURT OF THE
STATE OF CALIFORNIA

IN BANK

(Filed Sep. 15, 1994)

TRW INC., Petitioner

v.

LOS ANGELES COUNTY
SUPERIOR COURT, Respondent
JACK MA, Real Party In Interest

Petition for review DENIED.

MOSK
Acting Chief Justice

JAN 17 1995

No. 94-1064

In The Supreme Court

OF THE

United States

OCTOBER TERM, 1994

JACK MA,
Petitioner,

vs.

TRW INC.,
Respondent.

On Petition For A Writ Of Certiorari To The California Court Of Appeal

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether this Court should grant certiorari to review the California Court of Appeal's conclusion that TRW, a private corporation, did not become a state actor because its conduct in seeking to interview Petitioner regarding a potential security violation and in terminating him for refusing to appear without counsel at the contemplated interview was neither encouraged nor required by the government.

2. Whether this Court should grant certiorari to review the California Court of Appeal's conclusion that, even if TRW were a state actor, TRW did not violate Petitioner's Fifth Amendment privilege against self-incrimination by discharging him for his refusal to appear without counsel at a noncustodial interview.

TRW INC. SUBSIDIARIES AND AFFILIATES

Active Control Systems Limited
Comcred, S.A. de C.V.
Componentes Venezolanos de Direccion, S.A.
Fuji Oozx Inc.
Hopewell International Insurance Ltd.
United Insurance Company
Monitoring Technology Corporation
Moresa, S.A. de C.V.
Nippon Stud Welding Company, Limited
Rane Power Steering Limited
Servicred, S.A. de C.V.
Shin Han Valve Industrial Company, Ltd.
Sybase, Inc.
Toyoda TRW Automotive Inc.
TRW Australia Holding Limited
TRW-DAS, a.s.
Polimatic Eletrometalurgica Ltda.
Quality Safety Systems Company
TRW do Brasil, S.A.
TRW Module Systems S.A.
TRW Fuji-Serina Co., Ltd.
TRW Fuji Valve Inc.
TRW Koyo Steering Systems Company
TRW Keystone Powder Metal Products Company
TRW REDI Property Data
TRW Sabelt S.p.A.
TRW Seat Belt Systems (Poland) Ltd.
TRW Steering Co. Ltd.
TRW Steering & Suspension (Malaysia) Sdn. Bhd.
TRW Controls & Fasteners, Inc.
Wu Chou Valve Industrial Co., Ltd.

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No. 94-1064

In The Supreme Court

OF THE

United States

OCTOBER TERM, 1994

JACK MA,
Petitioner,

vs.

TRW INC.,
Respondent.

On Petition For A Writ Of Certiorari To The California Court Of Appeal

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

In this state wrongful termination case, Petitioner alleged that his employer, TRW Inc. ("TRW"), deprived him of his constitutional right to an attorney when it terminated him for refusing to attend a work-related interview without counsel. The California Court of Appeal, applying well-established precedent of this Court, held that TRW was not a state actor, and that, even if it were, Petitioner had no right to counsel.

In order to secure effective relief from this Court, Petitioner ultimately must obtain a reversal of both of the foregoing rulings. However, neither was incorrectly decided and neither merits this Court's attention. The lower court's rulings rest upon a straightforward and correct application of

decades of this Court's precedent, do not conflict with any decision of this or any other court, and effect absolutely no change in the law. Further, although a contrary decision, heralding new rules of law that all defense contractors are subject to the Constitution in their employee relations or that employees have a right to counsel at noncustodial interviews, probably would raise an issue of national importance, the lower court's principled refusal to introduce any such new rules does not do so.

Further, for the first time, Petitioner attempts to raise a purported question whether TRW was required to provide an advisory statement respecting his privilege against self-incrimination. Even if this Court were inclined to consider that issue, this case is a poor vehicle for doing so because that issue never was raised below at trial or on appeal. Equally important, it is a purely hypothetical issue that is not presented by the facts of this case.

STATEMENT OF THE CASE

A. TRW'S INTERNAL SECURITY INVESTIGATIONS

TRW is a privately-owned company that, at times, contracts to provide goods and services to the United States Government. In connection with its contracts involving classified information, TRW entered into a contract with the Defense Investigative Service ("DIS"), an administrative agency within the Department of Defense. Under that contract, TRW agrees to safeguard classified information and maintain a system of security procedures in accordance with the DIS's Industrial Security Manual ("ISM"). Appellant's Appendix in Support of Petition for Writ of Mandate [hereinafter, "Rec."] at 709. Under the ISM, TRW also agrees to report certain security-related information for the government's independent investigation and evaluation. Rec. at 711. The procedures for implementing the ISM are

administered and executed entirely by TRW employees, subject only to periodic audits by DIS. Appendix to Petition for Certiorari ("Pet. App.") at A7-A8.

Generally, TRW conducts internal security inquiries by, among other things, informally interviewing employees. Rec. at 1407. Interviews are conducted in an open cubicle with five-foot-high partition walls and no door. *Id.* at 1405-09, 1893-96. It is undisputed that an employee may choose not to speak during a security interview and is free to leave at any time. *Id.* at 1408-09, 1895. TRW's security department has no police powers, and its investigators are not deputized, carry no weapons, wear no uniforms or badges, and make no arrests. Pet. App. at A9. Nor does TRW security have any authority to terminate an employee who refuses to answer questions. Rec. at 1410. It is "uncontroverted" that the government has absolutely no involvement in such interviews. Pet. App. at A9.[1]

B. TRW'S ATTEMPTS TO INTERVIEW PETITIONER

In November 1985, a fellow employee reported that Petitioner had made unreported contacts with foreign nationals, used sensitive language over the telephone, and

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[1] Although Petitioner seeks to mischaracterize TRW's security investigations as the first step toward a "criminal prosecution" (*see, e.g.*, Petition at 17), the undisputed evidence is to the contrary. To begin with, even DIS — which promulgates the ISM — is not a criminal law enforcement agency and has authority to conduct only *administrative* investigations. Rec. at 710. Second, Petitioner's own expert admitted that in his 30 years of experience he *never* had seen a defense contractor's internal security investigation turn into a criminal prosecution. *Id.* at 1548-51. Third, the evidence established that "[i]f, during the course of an internal investigation TRW became aware of the potential for criminal charges, TRW would cease its investigation and notify the FBI; TRW had no participation in any subsequent investigation" that might occur thereafter. Pet. App. at A31-A32.

claimed to be the head of an international consortium of scientists studying "quantum gravity reversal" theory — an idea from the realm of science fiction. *Id.* at A9-A10. TRW undertook a routine investigation to determine if Petitioner had violated either its own internal security rule proscribing unreported contacts with *all* foreign nationals, or DIS's narrower rule regarding contacts with persons from certain designated countries. Rec. at 1391-92, 1404, 1419, 1889. As part of that investigation, TRW's investigator on the case attempted by telephone to arrange an interview with Petitioner at the latter's convenience. *Id.* at 1085, 1100. He assured Petitioner — and his counsel — that this was not a criminal investigation. Nonetheless, Petitioner refused to appear for the interview without his attorney. Pet. App. at A12-A13.

TRW then sent Petitioner a letter informing him of his duty to attend the interview and directing him to make an appointment or face termination. Petitioner never appeared for an interview. TRW subsequently reported to the Defense Industrial Security Clearance Office ("DISCO") (the government agency responsible for determining eligibility for clearances) pursuant to § 6b(1) of the ISM that Petitioner was alleged to have made unreported contacts with foreign nationals using sensitive language, and had refused to appear for an interview regarding those allegations. Pet. App. at A13-A14.[2]

After making this report, when it had no conceivable remaining responsibilities to the government, TRW — like any responsible employer — continued to seek to interview Petitioner to alleviate its continuing internal concerns. Rec.

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[2] *After* Petitioner failed to attend the interview, TRW's investigator called the FBI as a precautionary measure to inform it of Petitioner's refusal to be interviewed regarding alleged foreign contacts. Pet. App. at A13. There is no evidence that the FBI ever undertook an investigation of Petitioner.

at 362. Petitioner continued to refuse to be interviewed by TRW without his counsel present.[3] *Id.* at 1204. Eventually, TRW terminated Petitioner for insubordination. Pet. App. at A14.

C. THE PROVISIONS OF THE ISM

The two provisions of the ISM arguably at issue in this case are sections 6b(1) and 7. TRW issued a report to DISCO pursuant to section 6b(1) of the ISM. Section 6b(1) requires contractors to "submit reports [to DISCO] . . . of *any* information coming to their attention" suggesting that security access may be inconsistent with the national interest. Rec. at 48-49 (emphasis added). The ISM nowhere requires a defense contractor to conduct any investigation *whatsoever* under § 6b.

Section 7 of the ISM requires "reports" of actual or suspected compromises of classified information, and that the contractor conduct a "preliminary inquiry" to ascertain the circumstances surrounding any such compromise. However, the ISM does not address whether the contractor should go so far as to interview the employee alleged to have compromised classified information, whether an employee has a right to counsel in connection with any such inquiry, or the consequences of an employee's failure to cooperate.

D. THE OPINION BELOW

Petitioner alleged that his termination for refusing to be interviewed without counsel constituted a wrongful discharge in violation of public policy. In order to prevail, Petitioner had to establish first that TRW was a government

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[3]However, Petitioner met voluntarily, without his counsel, for 3½ hours with a DIS special agent to discuss these same issues. Rec. at 1206-16. TRW was not involved in the government's investigation in any way. *Id.* at 828-30, 1210, 1410. No criminal charges or civil citation ensued. *Id.* at 1232-33.

actor and, if so, that he had a right to counsel at the contemplated interview. The California Court of Appeal rejected both contentions.

The Court of Appeal held that the state action analysis turned on whether the particular conduct challenged by Petitioner was "specifically required or encouraged by the government." Pet. App. at A25. It concluded that this inquiry was not met. Specifically, the court concluded that, although § 7 of the ISM required TRW to initiate a "preliminary inquiry,"

> the ISM did not specify *how* this preliminary inquiry was to be conducted. The ISM did not even specifically require that an interview of the suspected employee be conducted much less mention the presence of counsel. Despite a myriad of detailed procedures [about other matters] specified in the ISM, Ma points to none which gives any direction concerning the participation of a lawyer.

Id. at A23 (emphasis original). The court observed that, quite apart from the ISM, the undisputed evidence confirmed that the government had absolutely no involvement in TRW's conduct: " '[The government] does not participate in, coordinate with or direct a contractor's internal security investigations, even if they are conducted to aid in [the contractor's] compliance with its reporting obligations under the ISM.' " *Id.*

Although unnecessary in light of its determination that TRW was not a government actor, the court below also unanimously rejected Petitioner's contention that he had a right to counsel at the TRW interview under *Miranda v. Arizona*, 384 U.S. 436 (1966). It held that although an individual has a Fifth Amendment privilege against self-incrimination, the right to the presence of counsel to implement that privilege does not arise absent a custodial

interrogation. Pet. App. at A27. The court found that because Petitioner failed to attend the interview, he had not been subjected to a custodial interrogation, and that, even if he had appeared, the interview would not have been custodial. *Id.* at A30-A32.

Petitioner also contended below that, under the Fifth Amendment, "the government has no power to punish an individual for refusing to voluntarily submit to interrogation." *Id.* at A32. The Court of Appeal unanimously dismissed this argument as "misconceived" and held that even the government may terminate an employee "who refuses to answer questions directly, specifically and narrowly related to the performance of the employee's duties." *Id.* at A33.[4]

REASONS FOR DENYING THE WRIT

I. CERTIORARI SHOULD BE DENIED BECAUSE THE LOWER COURT'S STATE ACTION RULING CORRECTLY APPLIED DECADES OF SUPREME COURT JURISPRUDENCE IN CONFIRMING THAT PRIVATE COMPANIES CAN COMPLY WITH THEIR CONTRACTUAL OBLIGATIONS TO THE GOVERNMENT WITHOUT BECOMING GOVERNMENT ACTORS.

Petitioner argues that the decision below somehow transforms the employment relations of thousands of Californian defense contractors and their employees by creating a purportedly "idiosyncratic rule . . . that, in California, defense contractors implementing a government-mandated security program are not state actors." Petition at 10-11. This assertion presupposes the existence of a contrary rule at some time, in some court, somewhere in this nation. Yet Peti-

[4]Petitioner subsequently sought a rehearing before the Court of Appeal and, thereafter, review by the California Supreme Court. Both requests were denied summarily.

tioner fails to cite any such authority, because no such authority exists. As discussed in Part II below, the cases in this Court are legion holding that mere obeisance to regulatory or contractual duties imposed by the government will *not* transform a private entity into a government actor. *See, e.g., Jackson v. Metropolitan Edison Co.*, 419 U.S. 345, 350 (1974); *Blum v. Yaretsky*, 457 U.S. 991, 1004 (1982); *Rendell-Baker v. Kohn*, 457 U.S. 830, 840-41 (1982); *United States v. Orleans*, 425 U.S. 807, 815-16 (1976).

The lower court's fidelity to these precedents was neither novel nor remarkable. It concluded simply that TRW — like all other private defense contractors in this nation — was not a government actor when it sought to interview its employee regarding his bizarre and erratic behavior, and terminated him for failing to appear for an interview as directed. This decision wrought absolutely no change in the law.

Ultimately, it is Petitioner himself who seeks a revolutionary rule, one that indeed would unhinge the state action doctrine from its traditional moorings and thereby transform thousands of defense contractors (not to mention a vast array of other businesses that serve important public interests) into government actors.[5]

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[5]Obligations similar to those imposed upon TRW by virtue of the ISM are the norm, not the exception, in today's regulatory society. As Judge Friendly observed in *United States v. Solomon*, 509 F.2d 863, 870 (2d Cir. 1975): "There would be a complete breakdown in the regulation of many areas of business if employers did not carry most of the load of keeping their employees in line and have the sanction of discharge for refusal to answer what is essential to that end."

II. CERTIORARI SHOULD BE DENIED BECAUSE THIS COURT'S JURISPRUDENCE COMPELS THE CONCLUSION THAT TRW WAS NOT A GOVERNMENT ACTOR.

A. Well-Established Supreme Court Jurisprudence Establishes That A Private Entity Only Becomes A Government Actor Where Its Conduct Is Specifically Dictated By The Government, Not Merely Because Its Conduct Furthers Some Important Federal Objective.

This Court long ago rejected the expansive conception of constitutional responsibility advocated by the Petitioner — that merely because a defendant is a large, regulated company whose business somehow furthers some important federal objective, such as the "national security effort," it thereby is transformed into a governmental actor.

For example, in *Jackson v. Metropolitan Edison Co.*, 419 U.S. 345, 354 (1974), this Court stated that:

> Doctors, optometrists, lawyers, Metropolitan [Edison], and Nebbia's upstate New York grocery selling a quart of milk are all in regulated businesses, providing arguably essential goods and services "affected with a public interest." We do not believe that such a status converts their every action, absent more, into that of the State.

This conclusion was even more emphatically expressed two years later, in *United States v. Orleans*, 425 U.S. 807, 815-16 (1976):

> Billions of dollars of federal money are spent each year [on government contracts]. These contractors act for and are paid by the United States. They are responsible to the United States for compliance with the specifications of a contract or grant, but they are largely free to select the means of its implementation. . . . Similarly, by contract, the Government may fix the specific and

> precise conditions to implement federal objectives. Although such regulations are aimed at assuring compliance with goals, the regulations do not convert the acts of entrepreneurs . . . into federal government acts.

Under these precedents, TRW cannot be held to be a government actor based upon some vague and visceral generalization about its purported role in "implementing a government-mandated security program." Petition at 10.

Instead, as this Court's jurisprudence makes clear, TRW cannot be held to be a government actor unless the *specific* conduct complained of by the Petitioner here can be ascribed to a *rule of conduct imposed by the government.* As the court below properly concluded, the record is bereft of evidence that the government was responsible for the particular conduct of which Petitioner complains, *i.e.*, TRW's directive that Petitioner appear without counsel for an interview and its decision to terminate him for refusing to appear. In making these decisions, TRW acted as a private employer, not the federal government.

The starting point of any state action analysis is the trilogy of cases decided by this Court in 1982, in which this Court comprehensively restated the principles governing this inquiry. In the first case, *Lugar v. Edmondson Oil Co.*, 457 U.S. 922 (1982), this Court held that two distinct requirements had to be met before private conduct could be ascribed to the state:

> First, the deprivation must be caused by the exercise of some right or privilege created by the State *or by a rule of conduct imposed by the State* or by a person for whom the State is responsible. . . . Second, the party charged with the deprivation must be a person who may fairly be said to be a state actor. This may be because he is a state official, because he has acted together with or has obtained significant aid from state officials, or

> because his conduct is otherwise chargeable to the State.

Id. at 937 (emphasis added).

In the second case, *Blum v. Yaretsky*, 457 U.S. 991, 1004 (1982), the Court succinctly unified these requirements: "[C]onstitutional standards [can be] invoked only where it can be said that the State is *responsible* for the *specific* conduct of which the plaintiff complains" (first emphasis original). The Court explained that "[m]ere approval of or acquiescence in" private conduct will not satisfy the requirement of state "responsibility"; to the contrary, the state must have "exercised coercive power or ha[ve] provided such significant encouragement, either overt or covert, that the choice must in law be deemed to be that of the State." *Id.*

As the Court of Appeal here recognized, *Blum* is dispositive of this case. In *Blum*, patients of government-funded private nursing homes challenged decisions, made pursuant to government cost-reduction regulations, to transfer them to facilities offering lower levels of nursing care. The nursing homes received more than 90% of their funding from the state, and were heavily regulated. The regulations provided *detailed* direction on the substantive criteria — set forth in a governmental questionnaire — by which the physicians were to make the transfer decisions, *as well as the procedure to be followed* by the physicians. The state regularly inspected the homes to ensure that the level of care selected was appropriate, and retained the power to direct transfers whenever it determined the level of care was too high. It even had the power to fine or disqualify nursing homes that did not implement the cost-control program properly. Finally, the state implemented the decisions by reducing the level of Medicaid payments made on behalf of transferred patients, and thus benefitted from the decisions.

Despite the overwhelming state involvement in the decision-making scheme, this Court held that there was no state action because the state was not "responsible" for the *specific* transfer decisions at issue. Although the state questionnaires set forth the criteria for those decisions, "the physicians, and not the forms, make the decision about whether the patient's care is medically necessary." *Id.* at 1006-07. Similarly, although state officials reviewed the assessment forms, they did not "approve or disapprove decisions either to retain or discharge particular patients." *Id.* at 1010.

The final case in the trilogy is equally apposite. In *Rendell-Baker v. Kohn*, 457 U.S. 830 (1982), defendant was a state-funded private school that was required by state regulations to maintain written job descriptions and personnel standards and procedures. As a condition of the school's receipt of funds, the state also had to approve all hiring decisions. Plaintiff, a vocational counselor, alleged retaliatory discharge in violation of the Constitution. This Court dismissed plaintiff's "public function" argument, reasoning that:

> The school, like the nursing homes [in *Blum*], is not fundamentally different from many private corporations whose business depends primarily on contracts to build roads, bridges, dams, ships, or submarines for the government. *Acts of such private contractors do not become acts of the government by reason of their significant or even total engagement in performing public contracts.*

Id. at 840-41 (emphasis added). The Court then rejected the plaintiff's state action claim because the specific discharge decision at issue was "*not compelled or even influenced by any state regulation.*" *Id.* at 841-42 (emphasis added).

Under these precedents, the indispensable requirement for state action is government coercion or significant encouragement of the *specific* activity challenged. This Court has adhered strictly to this guiding principle. *See, e.g., San Francisco Arts & Athletics, Inc. v. United States Olympic Committee*, 483 U.S. 522, 546 (1987) (the USOC was not a government actor because, although it served a national purpose, received its charter from Congress, was funded and extensively regulated by Congress, and had received from Congress the statutory right to sue to enforce its government-granted monopoly over the word "Olympic," the government did not influence the USOC's *specific decision* to sue to enjoin the use of the word "Olympic" by this particular plaintiff).[6]

"Applying these precedents here" (Pet. App. at A23), the court below correctly held that the determinative inquiry was whether the government "required or encouraged the particular deprivation of which Petitioner complains" — TRW's decisions to interview Petitioner without counsel and terminate him for not appearing. *Id.* Because neither the ISM nor the record supported the inference that the government had even the slightest role in TRW's conduct, the court below correctly concluded that "even though TRW's

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[6]The lower courts, too, have remained faithful to the precepts set forth in the trilogy. *See, e.g., McKeesport Hospital v. Accreditation Council for Graduate Medical Education*, 24 F.3d 519, 523 (3d Cir. 1994) (recognizing that the principles identified in the "Supreme Court's . . . trilogy" must guide any analysis of state action issues); *Kitchens v. Bowen*, 825 F.2d 1337, 1340 (9th Cir. 1987), *cert. denied*, 485 U.S. 934 (1988) (same). A particularly apt case is *Pinhas v. Summit Health, Ltd.*, 894 F.2d 1024, 1034 (9th Cir. 1989) (en banc), *cert. denied*, 498 U.S. 893 (1990) (physician's discipline did not constitute state action even where the disciplinary decision was made pursuant to a state-mandated review process, and the hospital was required to report adverse determinations to the state, because the state had not "exercised coercive power or encouraged the [Petitioner's] removal in any way").

possession of classified information is subject to TRW's contractual relation with the federal government, TRW's conduct in this case was private, not specifically required or encouraged by the government, and . . . not subject to the [Constitution]." *Id.* at A25.

B. Contrary To Petitioner's Assertion, This Court Has Not Tacitly Renounced The Principles Set Forth In The State Action Trilogy.

Petitioner contends that this Court has tacitly renounced the principles set forth in its 1982 trilogy. Nothing could be further from the truth. The purportedly "conflicting" decisions cited by Petitioner faithfully adhere to the principles set forth in the trilogy and are fully consistent with the decision below.

(i) The *Edmonson* Decision: In *Edmonson v. Leesville Concrete Co.*, 500 U.S. 614, 111 S.Ct. 2077 (1991), this Court held that, by exercising peremptory jury challenges in a racially discriminatory manner, defendant violated the equal protection rights of prospective jurors. Far from rejecting the trilogy, this Court in *Edmonson* applied precisely the same test first articulated in *Lugar*:

> [F]irst, whether the claimed constitutional deprivation resulted from the exercise of a right or privilege having its source in state authority . . . and second, whether the private party charged with the deprivation could be described in all fairness as a state actor.

Id. 111 S.Ct. at 2082-83 (*expressly* citing *Lugar*, 457 U.S. at 937). Notably, this also was the very test the court below applied in disposing of this case.

Moreover, Petitioner cannot meet either part of the *Lugar/Edmonson* inquiry. With respect to the first part, this Court in *Edmondson* held that the use of peremptory challenges was purely a creature of federal law. 111 S.Ct. at

2083. Here, the government neither compelled nor conferred upon TRW the "right or privilege" to interview its employees, much less to do so without counsel or terminate them for insubordination.

With respect to the second part, this Court found state action in *Edmonson* because the specific conduct engaged in would not have been possible without the "overt, significant participation of the government," as evidenced by the statutory framework governing jury selection, the involvement of the district courts and the Administrative Office of the United States Courts in creating procedures for such purposes, and the "direct and indispensable" control of the trial judge over such procedures. 111 S.Ct. at 2084-85.[7] Here, as the Court of Appeal correctly concluded, there was no government involvement whatsoever in TRW's conduct. *Conspicuously, not one single word of the Petition even addresses this critical inquiry.*[8]

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[7]Indeed, it is this precise holding that this Court, and the lower courts, have taken to be the *ratio decidendi* of *Edmonson*. *See, e.g., J.E.B. v. Alabama ex rel. T.B.*, ____ U.S. ____, 114 S.Ct. 1419 (1994) (*Edmonson* proscribes the state's "sponsor[ship]" of or "participation in" the perpetuation of invidious stereotypes) (*id.* at 1421, 1427); *McKeesport Hospital*, 24 F.3d at 524 (*Edmonson* confirmed that the "applicable standard" for state action depends upon whether the private party received " 'overt, significant assistance' " from the state or "acted . . . in concert with state officials").

[8]Petitioner's reliance on *United States v. Davis*, 482 F.2d 893 (9th Cir. 1973), is similarly misplaced. In *Davis*, the FAA issued directives mandating personal security searches and specifying in detail *who* could conduct the searches and *how*. Petitioner neglects, however, to cite the subsequent cases refusing to extend *Davis* to constitutionalize conduct going even one step further than *specifically mandated* by the FAA. *See, e.g., United States v. Ogden*, 485 F.2d 536, 538 (9th Cir. 1973), *cert. denied*, 416 U.S. 987 (1974) (baggage searches, although serving the FAA's anti-hijacking concerns, not state action because not specifically "directed or authorized by any federal regulation"); *United States v.*

Instead of applying the principles reaffirmed in *Edmonson*, Petitioner invites this Court to focus exclusively upon the statement in *Edmonson* that it is relevant to the state action analysis to consider the extent to which the private entity relies upon government assistance, whether it performs a traditional public function, and whether the injury caused is aggravated in a unique way by the incidents of governmental authority. 111 S.Ct. at 2083.

These other factors do not affect the result here. For example, the Court in *Edmonson* reasoned that the defendant there had been delegated a function traditionally reserved to the government, namely, determining representation on a governmental body (the jury). *Id.* at 2085. Petitioner simply echoes this by asserting that TRW "assum[ed] . . . the traditional governmental functions of national defense." Petition at 17. Needless to say, there is nothing in the record to suggest that TRW either makes or implements national defense policy. Further, the acts TRW engaged in here — seeking to interview its employee respecting potential misconduct, and disciplining him for noncooperation — are manifestly not the prerogatives of government; they are part and parcel of running any private business.[9] Similarly, this Court in *Edmonson* indicated that the incidents of government aggravated in a unique way the injury suffered by the prospective jurors because "[f]ew places are a more real expression of the constitutional

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Gumerlock, 590 F.2d 794, 799 (9th Cir.), *cert. denied sub nom., Fannon v. United States*, 441 U.S. 948 (1979) (same, regarding cargo searches).

[9]Petitioner's attempt to divorce the "public function" inquiry from the particular conduct he challenges renders his analysis meaningless. If such abstract characterizations could serve as the touchstone for governmental status, then every aspect of every defense contractor's business would be subject to the Constitution. Indeed, by parity of reasoning, any private business affected with a public interest would be subject to the Constitution. As noted earlier, this Court has emphatically rejected this dangerously expansive proposition.

authority of the government than a courtroom, where the law itself unfolds. . . . Race discrimination within the courtroom raises serious questions as to the fairness of the proceedings conducted there." *Id.* at 2087. By contrast, the government played absolutely no role, not even a symbolic or incidental one, in TRW's conduct.

(ii) The *West* Decision: In *West v. Atkins*, 487 U.S. 42 (1988), this Court held that when the state contracts with a physician to discharge the state's affirmative constitutional obligation to provide medical services to prison inmates, the physician becomes a state actor. *Id.* at 54-55. As the Court explained, the state cannot evade its constitutional obligations simply by delegating them to private parties. *West* has no bearing here because the government has no constitutional obligation to interview employees of entities with which it contracts, or to discipline such employees in their employment.

Even assuming that the government had some such obligation, the record precludes any inference that it delegated this duty to TRW. As Petitioner expressly conceded in the court below, the government does *not* delegate to defense contractors its investigative function (or, indeed, its evaluative or adjudicatory functions), but jealously retains this function for itself. Return to Petition for Extraordinary Writ, at 11 n.6.[10] The ISM is not to the contrary; as already noted, it imposes upon contractors a general duty of inquiry, but no

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[10]The regulations specify that DIS — not the contractor — is responsible for conducting security investigations (32 C.F.R. § 377.4), making determinations regarding the granting or revoking of security clearances, and conducting certain adjudicatory hearings (32 C.F.R. § 155.4-155.6 and App. A to Section 155). After receiving a contractor's report, DIS evaluates the information, *conducts its own administrative investigation*, if necessary, and determines whether an employee should retain a clearance. Rec. at 711 (emphasis added).

obligation to interview employees or deny counsel at such interviews.[11]

(iii) The *Becker* Decision: In *Becker v. Philco Corp.*, 372 F.2d 771 (4th Cir.), *cert. denied*, 389 U.S. 979 (1967), which predated the trilogy, the Fourth Circuit held that because a defense contractor had a mandatory duty to share confidences with the government pursuant to the *reporting* requirements of an earlier version of the ISM, it partook of the government's immunity to liability for defamation in connection with such reports. *Id.* at 774. Whatever the merits of that decision, the Fourth Circuit did not even discuss, much less decide, the entirely different question whether the contractor was subject to constitutional constraints under the "state action" doctrine. Moreover, even if TRW theoretically could be a government actor for the limited purpose of making a compulsory report, that conclusion has no bearing here. The conduct challenged here is *not* the making of the report, but rather TRW's insistence upon interviewing Petitioner without counsel.[12] As already noted, the ISM does not even mention the topic of employee interviews.

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[11]Petitioner contends that this Court in *West* "limited" *Blum* and *Rendell-Baker* because the exercise of "professional judgment" by the physician in *West* did not preclude a finding of state action. As the Court in *West* explained, these cases simply were inapplicable because the physician there had been employed specifically "to fulfill the State's constitutional obligations" to provide that professional judgment. 487 U.S. at 52 n.10.

[12]The cases of *Solomon, supra*, and *United States v. Stevens*, 601 F.2d 1075 (9th Cir.), *cert. denied*, 444 U.S. 917 (1979), are apposite here. Both held that the mere existence of statutory reporting obligations did not transform private entities — the New York Stock Exchange and a bank, respectively — into government actors when they undertook internal investigations to obtain the requisite information, even if such investigations entailed questioning under threat of termination.

In summary, the conclusion of the court below that TRW was not a government actor in this case rested on a straightforward application of principles articulated by this Court in cases spanning two decades. This Court should not grant certiorari simply to reconfirm these well-accepted principles.

III. CERTIORARI SHOULD BE DENIED BECAUSE PETITIONER ULTIMATELY SEEKS REVIEW OF THE LOWER COURT'S CONCLUSIONS OF FACT.

Although Petitioner purports to raise a constitutional issue of some moment, he ultimately does nothing more than dispute the lower court's factual conclusion that there was a complete "absence of evidence that the government required or encouraged the particular deprivation of which [Petitioner] complains." Pet. App. at A23.

Petitioner's factual argument is easily met. One need only compare the Court of Appeal's detailed, six-page analysis of the obligations contractually imposed on TRW by the ISM (*id.* at A6-A9, A23-A24) against Petitioner's conclusory assertion — unsupported by any textual reference — that TRW engaged in a "government-mandated security interrogation." Petition at 17. Such a comparison reveals that Petitioner's version of the facts is inaccurate. But more important, purely factual inquiries such as this in any event do not merit this Court's attention.

IV. CERTIORARI SHOULD BE DENIED BECAUSE THE ISSUE OF A PURPORTED RIGHT TO AN ADVISORY STATEMENT WAS NEITHER PRESENTED TO NOR DECIDED BY THE COURT BELOW.

Petitioner's wrongful discharge case is premised on the erroneous assumption that he had a constitutional right to refuse to attend the TRW interview without counsel. Petition at 9. Petitioner has been in constant search of a credible

constitutional theory to support this contention. His quest has led him now to seek certiorari on an entirely different basis than any presented to or considered by the court below. Certiorari should be denied for this reason alone.

In the trial court, Petitioner argued that his purported right to counsel arose under *Miranda v. Arizona*, 384 U.S. 436 (1966), because, he contended, the TRW interview would have been custodial. This was the sole basis for the trial court's Statement of Decision regarding a right to counsel. Pet. App. at A41-A46.[13] The Court of Appeal unanimously rejected this argument because Petitioner was not — and, had he appeared, would not have been — subjected to a custodial interrogation, the quintessential prerequisite to a right to counsel under the Fifth Amendment. Pet. App. at A26-A32. Petitioner has totally abandoned his *Miranda* argument here.

Petitioner also presented a new argument to the Court of Appeal: that his discharge impermissibly burdened his privilege against self-incrimination because " 'the Government has no power to punish an individual for refusing to voluntarily submit to interrogation.' " *Id.* at A32. The court unanimously rejected this argument as "misconceived" because the so-called "penalty cases" invoked by Petitioner hold only that "the government may not, upon threat of termination, require a public employee to speak *and* to waive . . . immunity from use in a subsequent criminal prosecution which would ordinarily attach to such a compelled admission." *Id.* at A33 (emphasis original). Because it was undisputed that TRW did not require Petitioner to waive immunity, these cases properly were held to be inapplicable here. *Id.* at A34.

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[13]The Statement of Decision was prepared by Petitioner's counsel, yet contains no findings regarding any assertion of or burden on the privilege against self-incrimination.

In a desperate attempt to create an issue worthy of review, Petitioner now claims that his discharge for refusing to be interviewed without counsel impermissibly burdened his privilege against self-incrimination because TRW failed to advise him that his answers would not be used criminally against him. This new argument was not raised before or considered by either the trial court or the Court of Appeal.[14] Accordingly, nothing in the lower court's opinion addresses, much less decides, whether Petitioner would have been entitled to an advisory statement had he appeared for the interview.

This Court generally refrains from addressing issues not raised below. *See, e.g., Browning-Ferris Industries of Vermont, Inc. v. Kelco Disposal, Inc.*, 492 U.S. 257, 277 n.23 (1989); *EEOC v. Federal Labor Relations Authority*, 476 U.S. 19, 24 (1986). This Court should apply this rule here to deny certiorari, because the Court lacks the benefit of any findings or analysis by the courts below respecting the purported constitutional issue raised by Petitioner.

V. CERTIORARI SHOULD BE DENIED BECAUSE THIS COURT WOULD HAVE TO HYPOTHESIZE THE EXISTENCE OF A SERIES OF FACTS TO REACH THE ABSTRACT CONSTITUTIONAL QUESTION POSITED BY PETITIONER.

There is a second reason why this Court should deny certiorari on the question whether an employer must advise an employee who invokes the privilege against self-incrimination that his answers cannot be used against him in a

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[14]Petitioner first mentioned this purported issue in his Petition for Review to the California Supreme Court, which was summarily denied. As such, the issue was improperly presented under state procedural rules as well. *See* Cal. Rule of Court 29(b) (as a matter of policy, California Supreme Court normally will not consider "any issue that could have been but was not timely raised in the briefs filed in the Court of Appeal").

subsequent criminal proceeding: the facts of this case simply do not raise that issue.

First, Petitioner never asserted the privilege against self-incrimination, but instead, the independent purported right to presence of counsel at the interview. *See* Part VI, below. Second, it is undisputed that Petitioner never appeared as directed for questioning, never was questioned, never invoked the privilege, and thus never was compelled to answer questions after invoking the privilege. Thus, in order to reach the purported constitutional issue here, this Court must assume — contrary to the evidence — a series of hypothetical events: that (1) Petitioner would have appeared for an interview; (2) the questions would have been potentially incriminating; (3) he would have invoked the privilege in response to such questions; (4) TRW would have required him to answer; (5) TRW would not have given an advisory statement; and (6) TRW would have discharged him for refusing to answer. *As a matter of undisputed fact, not one of these events occurred because Petitioner refused to appear for questioning in the first place.*

For sound prudential reasons, this Court typically declines to resolve constitutional issues based solely on hypothetical facts. *See, e.g., Communist Party of United States v. Subversive Activities Control Bd.*, 367 U.S. 1, 71-72 (1961) ("No rule of practice of this Court is better settled than 'never to anticipate a question of constitutional law in advance of deciding it.' . . . Courts can most wisely determine issues precisely defined by the confining circumstances of particular situations"). It should decline to do so here, because any ruling on this issue would be entirely advisory in nature.[15]

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[15]Notably, in every "penalty case" cited by Petitioner in which a court stated that some advisory statement was required, the individual actually appeared for questioning and invoked the privilege against self-incrimination. Petitioner did neither. As Petitioner's own attorneys candidly admitted: "We can only *speculate* what advice TRW would have given

VI. CERTIORARI SHOULD BE DENIED BECAUSE PETITIONER INVOKED ONLY A RIGHT TO COUNSEL, NOT THE SEPARATE PRIVILEGE AGAINST SELF-INCRIMINATION.

A. A Demand For Counsel At A Noncustodial Interview Does Not Invoke The Privilege Against Self-Incrimination.

The Fifth Amendment privilege against self-incrimination, except for limited exceptions not applicable here, is not self-executing. *Minnesota v. Murphy*, 465 U.S. 420, 434-36 (1984). Thus, an individual wishing to avail himself of the privilege must actually assert it. *Ibid.*

Petitioner never invoked the privilege against self-incrimination; he refused to appear for the interview based solely on a purported right to have his counsel present.[16] Indeed, far from asserting a right to remain silent, Petitioner admitted he would be "happy" to answer questions if his counsel were present at the meeting. Rec. at 1202.[17] Thus, Petitioner is forced now to contend that his demand for counsel somehow

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him." Petition For Review to California Supreme Court at 25 n.8 (emphasis added).

[16]In his second amended complaint, Petitioner asserted that TRW violated public policy by terminating him for his "insistence upon *having his attorney with him* at any TRW security investigations." Rec. at 661 (emphasis added). He did not allege that he was discharged for asserting any privilege against self-incrimination.

[17]Indeed, Petitioner demanded counsel due to his deteriorating relationship with his employer, not any purported concern about incrimination. Thus, he admitted that he demanded that "all communications" be through his retained attorney *even prior* to learning of any potential security issue, *i.e.*, before any conceivable concern of incrimination. Rec. at 1149-50. In fact, he testified that he would not discuss *any subject* with TRW or even attend a New Year's Eve dinner with TRW's President without his lawyer. *Id.* at 1187. Moreover, he voluntarily met with a government agent to discuss the exact same issues without his attorney and without invoking the privilege. *Id.* at 1206-14.

sufficed to invoke the Fifth Amendment privilege against self-incrimination. He fails to cite any authority for this leap of logic because it is not the law. A request for counsel, *absent a custodial interrogation*, is insufficient to invoke the Fifth Amendment privilege against self-incrimination. *See, e.g., Murphy*, 465 U.S. at 424 n.3 (declining to address whether defendant's statement that "he felt like calling a lawyer" was an attempt to invoke the privilege because he had no right to an attorney during noncustodial interrogation); *United States v. Rea*, 678 F.2d 382, 390 (2nd Cir. 1982) (despite request for counsel, continued questioning by probation officers did not implicate parolee's Fifth or Sixth Amendment rights).

Here, Petitioner no longer contests the lower court's holding that the contemplated interview was noncustodial. *See* Pet. App. at A26-A32. Thus, his insistence upon counsel was not an invocation of the privilege against self-incrimination. Accordingly, this case raises no issue regarding a purported burden on that privilege.

B. Petitioner Seeks To Expand The Right To Counsel To Noncustodial Interviews, Contrary To Well-Established Precedent Of This Court.

Despite his attempt to characterize this as a case raising the question whether he was entitled to some type of advisory statement, Petitioner ultimately asserts, as he must to prevail, that he had a right to insist on the presence of his counsel at the contemplated interview "to help him safeguard his privilege against self-incrimination and exercise it intelligently." Petition at 26. But even if Petitioner properly had invoked the privilege (which he did not), he still had no constitutional right to insist upon counsel at the contemplated interview.

As discussed above, the right to counsel and the privilege against self-incrimination are independent rights. Just as a

request for counsel does not itself invoke the privilege, a proper invocation of the privilege does not create a right to counsel as a procedural safeguard to protect the privilege, except in a *custodial interrogation. See, e.g., Miranda v. Arizona*, 384 U.S. 436, 469-470 (1966); *California v. Beheler*, 463 U.S. 1121 (1983). As this Court stated in *Edwards v. Arizona*, 451 U.S. 477, 485-86 (1981), "[t]he Fifth Amendment right identified in *Miranda* is the right to have counsel present at any custodial interrogation. Absent such interrogation, there would have been no infringement of the right . . . ."

Accordingly, even allegedly coercive or intimidating questioning occurring in a noncustodial setting does not give rise to a Fifth Amendment right to counsel. *See, e.g., Minnesota v. Murphy*, 465 U.S. 420, 424 n.6 (1984) (parolee under statutory duty to appear and answer probation officer's questions has "no federal right to have an attorney present"); *Beckwith v. United States*, 425 U.S. 341 (1976) (individual not entitled to *Miranda* warning during accusatory but noncustodial questioning); *Baxter v. Palmigiano*, 425 U.S. 308 (1976) (inmate retains right to remain silent but has no right to counsel during prison disciplinary hearing, despite potential criminal liability).

In sum, Petitioner's claim of entitlement to an advisory statement is a poorly disguised end-run around this Court's precedents limiting the Fifth Amendment right to counsel to custodial interrogations. Accepting Petitioner's reasoning would create an unprecedented expansion of the right to counsel to all types of noncustodial administrative investigations.[18]

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[18]Petitioner appears to recognize the absurd implications of his own assertion when he asserts: "We do not suggest every interview of an employee by a public employer concerning any potential infraction triggers a full panoply of constitutional rights." But he offers no

VII. CERTIORARI SHOULD BE DENIED BECAUSE EVEN THE STATE CAN PUNISH ONE WHO ATTEMPTS TO CIRCUMVENT THE INVESTIGATIVE PROCESS BY REFUSING TO APPEAR OR ASSERTING A BLANKET INVOCATION OF THE PRIVILEGE.

Even if Petitioner's demand for counsel somehow implicated the privilege against self-incrimination, this case still raises no issue of an impermissible burden on the privilege because Petitioner did not appear for questioning, and did not assert the privilege in response to specific questions. Under this Court's precedents, Petitioner cannot rely on the privilege to preempt the entire investigative process.

A. This Court Has Held That The State Can Punish An Individual For Refusing To Appear Without Impermissibly Burdening The Privilege Against Self-Incrimination.

In *Minnesota v. Murphy*, 465 U.S. 420 (1984) — which Petitioner fails even to cite — a parolee contended that Minnesota law, which required him *to appear* for a parole interview *and answer questions truthfully* under penalty of parole revocation, improperly penalized his privilege against self-incrimination. This Court flatly rejected this argument, holding that the statute penalized the parolee's failure to *appear* for questioning, not his invocation of the privilege in response to specific questions.[19] In drawing this distinction, the Court analogized the parolee's statutory obligation to

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standards for identifying when and under what circumstances public employees could refuse to appear for questioning without counsel.

[19]This Court specifically distinguished Petitioner's "penalty cases" on the ground that, in those cases, the employee not only was compelled to appear and testify, but *at the same time* was required to forego the privilege against self-incrimination. 465 U.S. at 434. Here, it is undisputed that TRW never attempted to force Petitioner to forego the privilege.

appear and answer questions to that of a person subpoenaed by a grand jury, noting that although the latter retains the right to invoke the privilege against self-incrimination in response to specific questions, he or she still has an obligation, punishable by contempt, to appear before the grand jury. Accordingly, Petitioner's contention that he could preemptively assert the privilege, and thereby avoid appearing for questioning, is precluded by *Murphy*.[20]

Nor do any of the "penalty cases" cited by Petitioner permit an individual to avoid appearing for questioning merely by asserting the privilege. Even in the cases in which the lower courts have opined that some advisory statement was appropriate, the employees, unlike Petitioner, appeared for questioning as directed and refused to answer questions based on the privilege against self-incrimination. *See* cases cited in Petition at pages 21 to 22. None of those cases applies here.[21]

Hence, there is no conflict between the Federal Courts of Appeals on the only question raised here, *i.e.*, whether a governmental employer may discharge an employee who refuses to appear for questioning as directed; it may do so. *See Gulden v. McCorkle*, 680 F.2d 1070, 1076 (5th Cir. 1982), *cert. denied*, 459 U.S. 1206 (1983) ("We . . . decline

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[20]Indeed, Petitioner's contention requires an even greater leap of logic, since he claims he could preempt his appearance at the interview by insisting on the *right to presence of counsel*. Under that reasoning, a subpoenaed grand jury witness could refuse to appear by insisting upon presence of his counsel during questioning, despite the fact that he has no right to counsel before the grand jury. *See, e.g., United States v. Mandujano*, 425 U.S. 564, 578-81 (1976).

[21]Similarly, Petitioner's citation to *Lefkowitz v. Cunningham*, 431 U.S. 801 (1977), and *Lefkowitz v. Turley*, 414 U.S. 70 (1973), does not aid him. Petition at 22-23. In both cases the individuals appeared for questioning and were required to waive their immunity rights under threat of sanction.

to promulgate the rule . . . that would allow an employee, before he or she is required to respond to any questions, to circumvent an investigation proceeding by claiming generalized Fifth Amendment concerns prior to the time those concerns have developed in a particularized context"). *See also Asherman v. Meachum*, 957 F.2d 978, 982-83 (2d Cir. 1992) (en banc) (revocation of home release status for refusal to appear for interview does not violate privilege because adverse action was based on prisoner's attempt to foreclose any questioning); *Grabinger v. Conlisk*, 320 F.Supp. 1213, 1217-18 (1970), *aff'd*, 455 F.2d 490 (5th Cir. 1972) (disciplinary suspension of police officers for refusing to take polygraph test without counsel did not violate Fifth Amendment).

Not only was TRW's sanction far less coercive than parole revocation in *Murphy*, but there is no evidence that, had Petitioner appeared and invoked his privilege against self-incrimination in response to specific questions, he would have been penalized in any way. Indeed, the uncontradicted evidence before the trial court established that TRW security does not compel employees to answer questions. Rec. at 1408, 1895.[22] Accordingly, Petitioner's termination for refusing to comply with its directive that he appear for an interview without his attorney neither impermissibly bur-

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[22]These facts dispose of Petitioner's unsupported assertion that he was faced with an "intolerable choice between submitting to TRW's interrogation and risking his liberty . . . and refusing to submit and forfeiting his job . . . ." Petition at 26. Petitioner had a viable *third option* — to consult with his attorney (*which he did*), appear as directed, and assert his privilege against self-incrimination to whatever questions, if any, he believed might incriminate him. Had he done so, *both* TRW's interest in having its employees follow its lawful instruction to appear and Petitioner's purported interest against self-incrimination could have been met. Moreover, this Court would then have a factual record on which to determine whether TRW would have penalized Petitioner's assertion of the privilege rather than his failure to appear.

dened his privilege against self-incrimination, nor raised any issue as to whether he would have been entitled to an advisory statement had he appeared as directed and asserted the privilege against self-incrimination.

B. Even If Petitioner Had Invoked The Privilege, Any Such "Blanket Invocation" Of The Privilege Is Legally Ineffective.

Reflecting the rationale and result in *Murphy*, the Federal Courts of Appeals consistently have held that, absent a custodial interrogation, one seeking to invoke the privilege may not simply assert a "blanket privilege" to avoid answering any questions or to excuse a failure to appear. Rather, one must assert the privilege in response to specific questions, so that a reviewing court can test the validity of the assertion on the basis of a factual record showing whether the questions asked tended to incriminate. *See, e.g., Anglade v. Sprague*, 822 F.2d 1035, 1037 (11th Cir. 1987) (rejecting defendants' attempt to justify failure to attend trial as an improper blanket assertion of the privilege); *United States v. Carroll*, 567 F.2d 955, 957 (10th Cir. 1977) (circuit courts have held with "great uniformity" that a blanket refusal to answer questions does not raise constitutional concerns); *United States v. Malnik*, 489 F.2d 682, 685 (5th Cir.), *cert. denied*, 419 U.S. 826 (1974) (individual must appear for questioning and specifically assert privilege as to particular questions; court will not speculate about what questions might have been asked). Thus, Petitioner's refusal to attend the interview, like a blanket assertion of the privilege, is legally ineffective to invoke the privilege or to excuse his failure to appear for questioning. Moreover, it deprives this Court of any factual record upon which to analyze the application of the privilege or to decide Petitioner's purported constitutional issue.

VIII. CERTIORARI SHOULD BE DENIED IF THIS COURT CONCLUDES THAT EITHER THE STATE ACTION OR THE FIFTH AMENDMENT ISSUE IS NOT WORTHY OF REVIEW.

The court below found that TRW was not a state actor, and that, even if it were, Petitioner had no right to counsel at the contemplated interview. Thus, in order to secure meaningful relief from this Court, Petitioner must show that *both* holdings below are worthy of this Court's review. Accordingly, if this Court finds that only one of these two issues merits review, then it nonetheless should deny certiorari because its review necessarily will prove irrelevant to the ultimate outcome here.

CONCLUSION

For each of the foregoing reasons, Respondent respectfully prays that the Petition for a Writ of Certiorari be denied.

Dated: January 16, 1995

Respectfully submitted,

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